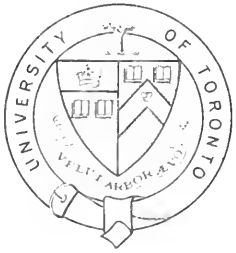

Queen's University.

COURSE IN COMMERCIAL LAW.

Note.

The object of this course is to give the student a grasp of the essential forms and principles governing ordinary business transactions, and particularly of the rules bearing upon the relation of the banker to his customers. Even those persons who are not primarily engaged in business have frequent occasion to feel the need of knowing the broad limits of their legal rights and obligations. Every man who signs a note, rents a case, or mortgages a farm has entered into legal relations which are none the less binding because he may be very hazy as to just what they involve. Ignorance of the law, the old saying runs, excuses no man. And as for those who are day after day carrying on business transactions, such knowledge seems requisite for guidance in matters where responsibility must be incurred, and to increase the interest in matters of routine.

The lessons which follow are of course only a brief introduction to the subject. They do not aim to make the layman a lawyer, nor do they present the subject as a lawyer would approach it. The endeavor is to summarize the more important and general rules, and to give such an understanding as will enable the student, not to dispense with the advice of his official superiors or legal advisers, but to consult them before rather than after.

No textbook is available which covers the whole field in an untechnical way and with special emphasis on the banker's point of view. An admirable introduction to the general subject is, however, afforded by Professor Geldart's clear and concise work, **The Elements of English Law.** This brief text, and, more particularly, the printed bulletins which follow, will constitute the reading in this course.

LESSON I.

Scope and Sources of Law. Formation of Contracts.

Read Geldart, Chap. I-II, IV and VI.

1. The Scope and Sources of Law.

Law may be defined as the body of rules by which courts are guided in administering justice. When we speak of **a law**, we refer to some specific measure passed by parliament or other law-making body. When we speak of **the law**, however, we have in mind a much broader field, including not merely all the statutes in force, but all the usages and precedents recorded in the decisions of countless courts. The law of Canada or any other modern state may be said to be the summing up of men's experience through thousands of years, the result of long and chequered striving for justice, imperfect, it is true, and requiring constant modification to adapt it to changing conditions and changing ideals, but yet one of the greatest of our inheritances from the past.

There are many branches or divisions of law, and many points of view from which a classification may be made. The following classification, though not exhaustive, is perhaps sufficient for present purposes:—

Classification of Law.

According to Range of Authority	International Law		
	Municipal Law.	According to Subject-matter	Criminal Law
			Civil Law.
		According to Source	Common Law
			Equity.
			Statute Law.

By **international law** we understand the body of rules or usages which set forth the rights and duties of nations; it is sometimes denied a right to be termed law, because of the fact that there is no supreme authority charged with enforcing it, and no definite punishment affixed, but, in view of the increasing use of arbitration courts, the reliance on legal methods and precedents, and the measure of sanction that lies in public opinion and the material force of aggrieved nations, the use of the term seems justifiable. **Municipal** law, on the other hand,

includes all the rules prescribed by a sovereign state for the guidance of its own citizens: the term municipal is a technical one, and does not refer to municipalities in the modern sense.

Municipal law, again, may be subdivided according to its source. To the layman, **statutes**, or laws passed by parliaments or other legislative bodies, appear to be the chief source of law. Perhaps even more important, however, than the laws made by the legislatures are the laws made or expounded by the courts, in other words, the **common law**. The common law developed in England through a long series of decisions of judges who were assumed to be applying and interpreting certain ancient principles and usages, the custom of the realm, the wisdom of their ancient ancestors. It is found, not in any single act or code, but in the reports of tens of thousands of cases decided by the courts from the days of Edward the First down to the days of George the Fifth. It is called unwritten, though actually recorded in printed reports, because its authority depends on custom and tradition; both the statute law of parliaments and the common law of the courts are written or rather printed, but the one is scattered through countless books while the other is a more or less compact and coherent summary found in fewer volumes. The common law was later supplemented by **equity**, the body of rules developed in the English chancery courts to modify the occasional harshness and technicality of the ordinary law. Both the common law and the rules of equity may be changed at any time by statute. For a discussion of the advantages and disadvantages of the common law, or, what is nearly equivalent, the system of basing law upon decided cases, and also of the question how far judges really make new law and how far they simply reveal old law, see Geldart.

Municipal law, again, may be divided into various classes according to the **subject-matter** or **jurisdiction.** The most important distinction from this standpoint is that between civil and criminal law. **Civil law** deals with the rights of individuals, **criminal law** with wrongs to society. Civil law includes all the rules for establishing and recovering private rights. Criminal law has to do with the prevention or punishment of acts

which not only injure private individuals but constitute a danger to the entire community. A man who has broken a contract with his neighbor is liable, under the civil law, to a suit of damages by the neighbor: had he broken his neighbor's head or stolen his horse the state would consider that the public peace was endangered by this open and flagrant wrong, and would set the criminal law in motion to punish him.

Commercial law is not a distinct body of law. The term is used somewhat loosely to indicate those parts of the civil law which most directly concern business transactions. It includes common law principles as well as statutory amendments. Many of its principles, summed up as the law merchant, or merchant's law, were developed, not by the courts, which were long ignorant of business usage, but by merchants and traders from different parts of Europe; their customs were gradually given weight by the common law courts, until under one of the greatest English judges, Lord Mansfield, (1705-1793) a systematic and consistent body of mercantile or commercial law was established.

Thus far reference has been confined to law in general or law as developed in England. To understand the sources of the law of Canada it is necessary to refer to the other great system of jurisprudence, Roman law, which with English law, dominates practically the whole civilized world — except where Hindu, Mohammedan and Chinese law are in force. The Romans were the greatest administrators and law makers of antiquity. Through over one thousand years of unbroken development they built up a logical, comprehensive and thoroughly worked-out body of laws and precepts, which were finally codified or put into systematic form under the later emperors (e.g. Justinian's code, 534 A.D.). These codes provided the basis of the legal systems which developed among the nations that rose on the ruins of the Roman Empire after the barbarian invasions. The ancient Roman law, modified of course by varying racial traditions and changing circumstances, is the foundation to this day of the law, not only of Italy, Spain, Portugal, France, Switzerland, Germany, Holland, Belgium, and to a lesser extent Eastern Europe, but of those countries which

were influenced or colonized by the peoples of continental Europe—the Spanish and Portuguese colonies in Central and South America, the French colonies in North America, Mauritius or the French East Indies, the Dutch colonies such as South Africa or Ceylon, and Scotland, which was in close political and social relations with France for centuries. English law, developed from old Anglo-Saxon and Frankish traditions, and filled out by borrowings, acknowledged or unacknowledged, from the great storehouse of Roman law, is to-day the basis of the law of most English-speaking countries, England and Wales, Ireland, the United States except Louisiana, Canada except Quebec, Australia and New Zealand, etc.

English settlers in Virginia or Nova Scotia carried with them the common law, which was as much a part of their inheritance as their language or their political ideals. In the United States to-day, except in Louisiana, the old common law of England is the law of the land, except in so far as it has been changed by state or federal statute or modified by new usage. This fact, taken in conjunction with the principle which underlies the whole case-law system, namely, that the law which the judge is applying is the old law, the custom of the fathers, explains how it is that in spite of the political separation which has since come about, a United States court may, in 1915, quote a decision on a common law point given in an English court in 1914, or vice versa. The judge in 1914 is supposed merely to have explained what the common law really implied centuries ago, and since both countries inherited the same original common law, decisions in either country may have a bearing on the law of the other.

In the English-speaking provinces of Canada not only the common law but such of the English statutes as were applicable were adopted as a basis. Once adopted, however, this law became the law of Nova Scotia or Ontario or British Columbia, and subject to modification by the legislature of the province, or in certain cases, by the Parliament of Canada. In addition to these original inheritances or adoptions, Canadian legislative bodies have frequently in recent years adopted, with slight modifications, English statutes summing up im-

portant sections of the common law, such as the Bills of Exchange Act or the Sales of Goods Act.

Similarly, French colonists on the St. Lawrence or the Mississippi brought with them their customary law, particularly the Coutume de Paris, or the body of rules and customs in force within the jurisdiction of the Parliament or court of Paris. These customs were modified from time to time by ordinances of the Sovereign Council or Intendants of the colony, or by such of the edicts or ordinances of the King as were specially applicable to the colony or were formally registered with the Sovereign Council. By the Quebec Act of 1774 a compromise was effected. English criminal law was introduced, but the old French civil law rules, developed in the various ways mentioned, remained in force, because part and parcel of the life of the people, involving intimate and every day relations in an entirely different way from the provisions of the criminal law. This civil law was from time to time modified by statutes and interpreted in various directions by court decisions, until such confusion and uncertainty developed that in 1857 the legislature determined to codify hte law, or sum it all up in a systematic manner. The Commission appointed for this purpose reported in 1866, when the new code was enacted. Their work is considered by experts one of the clearest and most successful attempts at codification yet made. In their labours they made much use of the Napoleonic Code, a similar attempt to sum up and harmonize the many confused and conflicting laws of France, which was begun under the Revolution and completed under Napoleon in 1804. The Civil Code of Quebec is modified from time to time by the provincial legislature. In strictly commercial matters there is a large blending of English law and practice, but many important differences between Quebec and the other provinces remain and will be noted later.

The law under which business is transacted in Canada, then, consists in the main of (1) the common law of England, as interpreted by the courts and modified by our legislatures; (2) a few old English statutes, the number in force varying in the different provinces according to the difference in date of

settlement or of formal legislative adoption; (3) statutes passed by the provincial legislatures or Dominion Parliament, the latter, by the British North America Act, having jurisdiction over the subjects of banking, currency and coinage, bills of exchange and promissory notes, bankruptcy and insolvency, patents and copyrights, navigation and shipping, etc., while the provinces have jurisdiction over the rest of the field of commercial dealings and civil rights in general; (4) in the province of Quebec, to some extent, instead of (1) and (2), the old civil law of France, modified and codified and again amended as explained above.

2. The Formation of Contracts.

Commercial law is chiefly concerned with contracts of one kind or another. You hire a workman; that is a contract. You sign or endorse a note; that is a contract. You register as a guest at a hotel; that is a contract. You buy a railway ticket; that is a contract. You sell a ton of coal; that is a contract. A contract may, in brief, be defined as an agreement between two or more persons for legal consideration, or, enforceable in a court of law.

The main rules regarding the formation, operation and discharge of contracts in general will first be discussed, and then attention will be given to some particular contracts, such as contracts for the sale or bailment of goods or contracts contained in commercial paper, etc.

Kinds of Contracts.

Contracts may be classified in different ways, as to form, terms, time of fulfilment, or validity.

As to **form,** contracts are either (1) **formal** or (2) **simple** or **parol.** Formal contracts are also known as contracts under seal, and must have a seal attached. Deeds, bonds, mortgages and written leases are the forms of contracts which generally come under this head. The use of the seal goes back to the days when the mighty ones of the earth could not read or write, and therefore signified their assent to a bargain by a stamp or seal on a document. Formerly the seal was an impression on wax, but now a wafer or mark on the paper itself suffices. Simple contracts may be either verbal or written, and,

unlike a contract under seal, require a "consideration," a quid pro quo, a something to be done or given in exchange, to be binding. Some of the more important rules as to what contracts must be in writing will be noted later.

As to **terms**, contracts are **express** or **implied.** An express contract is one in which the agreement on both sides is explicitly stated, while in an implied contract some of the terms are left to be understood from acts or words.

> Example: A contractor, in the habit of purchasing supplies, orders over the telephone 10,000 bricks of a certain quality it is implied that he agrees to pay the current market price. You board a street car; you thereby enter into an implied contract to pay the regular fare, while the company agrees to carry you to its advertised destination, if need be, with due care and diligence.

As to **time of fulfilment**, contracts are **executed** or **executory.** An executed contract is one which has already been carried out in full by both parties. An executory contract is one some of the terms of which are not yet fulfilled. A contract may be executed so far as one party is concerned, and executory as to the other.

As to **validity**, contracts are classified as (1) valid; (2) void; (3) voidable. A valid contract is a binding one, in which all the essential elements noted below are found. A void contract is one which is not in reality a contract, is lacking in one or more of these essential elements, and cannot be enforced. A voidable contract is one in which a flaw exists, but which may be affirmed or rejected by one of the parties at his option. A void contract has no effect from the beginning and cannot be ratified; a voidable contract may become binding if the person who has the right to reject it fails to do so.

> Example: X and Y are both competent parties: X offers to sell Y 10,000 bushels of No. 1 Northern wheat at $1.00 a bushel and Y accepts; no mistake or fraud exists; the contract is presumably a valid one. A sells a bill of goods to B, who has led A to think that he is C, a man of similar name. The contract is void, and B has no right to the goods. D, a youth of 19, sells a house to E; on coming of age he may affirm or disavow the contract, which, meanwhile, is voidable.

Essential Elements in a Contract.

In a binding contract the following are requisite:

(1) Competent parties.
(2) Legal subject matter.
(3) Consideration or inducement.
(4) Mutual assent, or offer and acceptance.

Example: A offers to sell B a house for $5,000, and B accepts the offer. (1) A and B are the parties, presumably competent. (2) The transfer of ownership in the house, presumably a lawful object, is the subject matter of the contract. (3) The $5,000 offered is the consideration. (4) A's offer and B's acceptance constitute the necessary mutual assent or meeting of minds.

Competent Parties.

The first condition of a valid contract is that the parties to it should be competent. Every person is presumed to have capacity to contract, but there are certain excepted classes whose age, status or condition renders them wholly or partly incapable of binding themselves. These excepted persons are (1) infants or minors (2) married women (3) alien enemies (4) persons of unsound mind (5) drunkards and (6) corporations, if acting ultra vires.

Infants. First, who are infants or minors? Every person under twenty-one years of age is a minor. In some of the states to the south, females come of age at eighteen, and both males and females at marriage, whatever their age may be. This is not true here, except that in Quebec a minor may be emancipated by marriage or by act of the courts, and in this case he acquires capacity to contract, except in dealing with his real property.

What general legal capacity have infants? They may give evidence in court or sign documents as witness, if old enough to understand the meaning of their acts, (except in Quebec, where minors cannot witness wills made in authentic form), or act as agents to bind others. As to contracts, the general rule has been adopted, in order to protect minors from persons who might take advantage of their assumed lack of experience and judgment, that a minor cannot make a binding contract. His contracts are voidable, not void, that is, they

may be ratified on coming of age, and then become binding. They are binding on the other party, if an adult; the minor alone has the power to choose whether or not he will be bound. This right is a personal one; it cannot be exercised by his guardian during minority, or by his creditors after majority, though in case of death or lunacy, his legal representative may exercise it. A minor may repudiate his contracts either during minority or after coming of age. This may be done in writing, by express words, or by acts which make the change of intention clear. If the contract is an executed one, that is, if both parties have done what they agreed to do, he may void it only, it would seem, on condition that he returns the benefit he received. (If male after coming of age, the repudiation must be in a reasonable time, or he will be bound.) An executory contract, on the other hand, made by an infant, is considered void unless confirmed after reaching legal age.

The chief exception to this rule is that he must abide by contracts for necessaries. The exception, like the rule, is based on a desire to protect the infant; if he were not able to make valid contracts for necessaries, he might be unable to induce other persons to sell them to him, and thus might suffer. What necessaries are, depends upon circumstances. The seller, if he is to prove the contract a valid one, must show not only that they were articles or services suitable to the minor's condition of health or station of life, but that he was not already sufficiently supplied with them. Food and clothing, medical attendance, education, would all be considered necessaries, but the quality and amount necessary would be matter for examination. Food and attendance essential for an invalid would be superfluous for the person in good health. A gold watch might be held conventionally a necessity for the millionaire's son, but not for the day laborer's son. If, however, it was proved that he already had a gold watch, a second would not be a necessity for him. Further, the law steps in to protect the minor by ruling that even for necessaries he cannot be compelled to pay more than a fair price: if he needed a suit of clothes, and agreed to pay $50 for a suit which afterwards proved to be worth only $25, he would be obliged to pay only $25.

A minor's note cannot be collected. If given for necessaries, it may be offered as proof of the debt, but the holder cannot sue on it. An endorser of the note would be bound. The minor could sue on a note due him, or could lawfully transfer it to other parties.

The parents of a minor living at home are liable for his purchases of necessaries, unless they have given warning that they will not be bound; they are not liable for his purchases of luxuries. They are not liable for his purchases either of necessaries or luxuries, if he is living away from home and is earning and collecting wages, unless they pay part of his bills for him directly, in which case they may be held liable for all his debts.

The above rules apply to the English-law provinces, and also to Quebec, except in the following points: (1) In Quebec, a minor's contracts are not all voidable; the court will consider the good or bad faith of the other party, and the advantageousness or otherwise of the bargain; unless it can be shown that the minor has suffered some real injury, his contract will stand. (2) Minors may be emancipated from some, though not all, of the incapacities of minority, (a) by marriage, (b) by action of a court, (c) by entering into any trade or occupation, so far as transactions in that trade are concerned. Such an emancipated minor may enter into ordinary contracts, may receive income from his property and give receipts, or grant leases for not more than nine years, but he cannot bring or defend a suit, nor borrow money without the consent of a curator or guardian or give a mortgage or deed without the authority of a court or prothonotary.

Married Women. Under common law, the rights of married women were narrowly restricted. The husband was head of the family; at marriage, title to his wife's personal property and a life interest in her real property was vested in him; she could not make a valid contract in her own name. In England, the United States and the English law provinces of Canada, this rule has been very greatly modified by statute in the past generation, and now a married woman has in most cases the same legal capacity as a man or an unmarried woman. She

may hold separate property in her own name, make contracts, sue and be sued; her property is free from the control and from the debts of her husband. She may, without her husband's signautre or consent, dispose of her real estate during her lifetime or by will (except in Nova Scotia, where the husband must join in the deed or give consent in writing to the provision in the will; in Prince Edward Island, where the husband must join in the deed, and where right of curtesy exists —the right of the husband to a life interest in his widow's real estate if any children have been born of the marriage, a right roughly corresponding to the wife's right of dower; in New Brunswick, where right of curtesy exists; and in Manitoba, where she cannot will it away from her children).

In Quebec we find very important differences in the legal capacity of married women. There the continental practice of community of goods has been followed. In ordinary cases both her property and that of her husband fall upon marriage into a community of property. While this belongs to both, the husband is head of the community, and has power to administer the whole. The wife cannot bind herself by contract without his consent. Immovable property belonging to her before marriage or bequeathed to her after marriage by parents or grandparents belongs to her separately, but the income from it belongs to the community. At the husband's death, the wife takes half the common property; the husband can will away only the other half.

By contract before marriage or order of the court after marriage husband and wife may be declared separate as to property. When separate as to property, the wife may dispose of her moveable property, but cannot dispose of her immoveable property or bank stock without the consent of the husband or an order from the court.

In Quebec, again, a wife cannot become a public trader without the husband's consent or tacit acquiescence: she must also register her intention. If she is in community of property, she binds the common property; if separate as to the property, her separate property alone. In the English law provinces a wife needs no authorization to become a public trader.

By Section 48 of the Bank Act, in case of a transfer of bank shares by the marriage of a female shareholder, the transmission must be authenticated by a declaration in writing, accompanied by a copy of the register of the marriage, and declaring the identity of the wife with the holder of such share, the declaration to be signed by both husband and wife. If the shares are to be held as the separate property of the wife, and at her disposal, this must be stated in the declaration.

By Section 95, a bank is authorized to receive deposits from, and pay out principal or interest to, any person whomsoever, whatever his age, status or condition in life, and whether such person is qualified by law to enter into ordinary contracts or not. If the person making such deposit could not, under the law of the province where the deposit is made, deposit and withdraw money, without the sanction of this section of the Dominion law, (which overrides the provincial law), the total amount to be received from such person on deposit at any time must not exceed $500.

When a married woman in Quebec, in community of property, opens a bank account, it is desirable, if her operations are not to be limited to $500, to obtain an authorization from the husband to deposit and withdraw money. (See form, page 202, Stewart Patterson's **Banking Principles and Practice.**)

Alien Enemies. During war all peaceful relations between subjects or citizens of the hostile countries are prohibited. No contract may be entered into with alien enemies after the outbreak of war, unless by special license from the Crown. It has hitherto been held that while an alien enemy could be sued for breach of contract, he could not sue in our courts during war: there is, however, some ground for believing that the nations which signed the Hague Conventions of 1907, bound themselves, by Article XXIII of the Regulations respecting the Laws and Customs of War on Land, to permit alien enemies to bring suit. Alien enemies domiciled in our own country may, it has been recently decided, bring suit. Contracts made before the war are suspended, but may be enforced after peace is declared.

Persons mentally incompetent. Since a "meeting of

minds" is necessary for a valid contract, persons who because of insanity or idiocy or extreme drunkenness are incapable of understanding their actions are specially protected in their contracts. (1) Insane persons who have lucid intervals or drunkards who sober up may while sane or sober (or, rather, sane and sober) enter into binding contracts, unless they have judicially been declared insane or habitual drunkards, in which case they cannot make any valid agreement so long as the order of the court holds. (2) A contract made by an idiot or a person insane or so completely drunk as not to know what he is doing is voidable, not void. It may be ratified by himself in a lucid or sober interval, either expressly or by acts which signify clearly his intention to accept it. It may be avoided (i.e. declared void,), through the same agents, only if it can be proved that the other party knew of the insanity or other ground of incompetence, and that real injury was done. In such a case, if the contract has been executed, the mentally incompetent party should, if possible, restore the consideration or benefit he received, but if he cannot do so, he may still reclaim what he himself gave. On the other hand, if the other party can prove that he was innocent of any such knowledge, and that no harm was done, then, especially where the contract has been executed in whole or in part, and the original position of things cannot be restored, the contract will be held valid. (3) Contracts for necessaries will in any case be held binding, including necessaries supplied to the wife or children of the mentally incompetent person.

A **corporation** may of course make only such contracts as it is authorized by its charters to make, or such as are incidental or reasonably conducive to the objects for which it is incorporated.

Examples:

Carpenter v. Carpenter: plaintiff, an infant, traded horses; later wished to trade back again; defendant refused; court held he could recover his horse, and could do so even if the horse he had received in exchange was injured or dead.

Strong v. Foote: defendant, aged fifteen, and heir to large fortune, had teeth filled by plaintiff, a dentist; bill of $93 rendered, proved that teeth were in bad shape; held defendant must pay.

Hyman v. Cain: defendant, an orphan about nine years of age, boarded with plaintiff for two years; held must pay reasonable price for necessary board and lodging.

Nash v. Inman: plaintiff, a tailor, supplied defendant, an infant, who was an undergraduate of Trinity College, Cambridge, and son of an architect in good practice, with clothes at credit price of £145, including eleven fancy waistcoats. Held, no evidence that goods were necessaries: plaintiff not able to prove (i) that the contract was for goods reasonably necessary for defendant's support in his station of life, and (ii) that the defendant had not already a sufficient supply.

Valentine v. Canali: infant made contract to become tenant of house and pay for furniture in it; occupied the house and used the furniture, paying £68 on account and giving promissory note for the balance, £24; held, that the contract to pay was void, and that the note could not be collected, but that the infant could not reclaim the £68, as he had had the use of the house and furniture for which the money was paid.

Gore v. Gibson: defendant, when so drunk as to be utterly unable to comprehend nature of his act, endorsed a bill of exchange to plaintiff, who knew his condition; defendant can refuse to pay.

Matthews v. Baxter: defendant, when drunk, agreed to buy certain houses from plaintiff; later, when sober, he ratified the contract; held, he was bound by it.

Gribben v. Maxwell: plaintiff, a lunatic, conveyed certain real property to defendant, who was not aware of her insanity; proved price paid was a fair one; held transaction must stand.

Durham v. Durham: held, that to avoid a contract of marriage, it is only necessary to show that one party was insane at the time, and not necessary, as in case of other contracts, to prove that the other party knew.

Questions and Answers in Journal of Canadian Bankers' Association.

1. Q. What is the Ontario law relating to money deposited by minors? Which would you advise, opening a savings bank account in the name of a minor, or in the name of a parent or guardian in trust for the minor?—A. There is no general law in Ontario respecting money deposited by minors but under the terms of Section 95 of the Bank Act, (see above), banks may receive deposits from minors and repay them to minors at any time. Notwithstanding the authority given by the Act, we would think it prudent to take a deposit in the name of a parent or guardian in trust for a minor, rather than directly in the name of the minor. This, however, would apply only in cases where the minor is quite young.

2. Q. May one under age be lawfully appointed the attorney of a merchant to conduct his bank account?—A. Yes, the fact that he is under age does not disqualify him.

3. Q. A minor, resident of Ontario, dies leaving a balance in savings bank. Can the father of such minor draw the money?—A. Money at credit of a deceased depositor who was a minor at the time of his death can only be legally drawn by his administrators duly appointed.

4. Q. Can a married woman, in the province of Quebec, operate a bank account without the authority of her husband, even when living in community with him, provided the balance does not at any time exceed $500-—A. The case of such a depositor would be covered by Section 95 of the Bank Act, and she would be free to deposit and withdraw money without her husband's consent, provided that the balance does not at any time exceed $500, no matter what the aggregate amount of the transaction may be.

5. Q. A married woman (Quebec) holding property in her own right, endorses a note as an accommodation endorser. Could a bank, having discounted same for the promissor, collect from her? —A. In the Province of Quebec, under the circumstances stated, the woman's endorsement would be simply invalid. (In the other provinces, also, as held in **Stuart v. Bank of Montreal,** a married woman's endorsement or guarantee for her husband is not valid unless she signs independently, on the advice of other friends or legal advisers).

6. Q. What is the best way to transfer a bank balance standing in the name of a spinster to her married name? Is a declaration of transmission an actual necessity?—A. We think no declaration is necessary. The heading of the account may be changed on advice from the depositor that in consequence of her marriage she takes and will hereafter sign her married name; or she may draw for the balance due her and re-deposit it in her new name. If she had money at her credit in her maiden name, and drew a cheque in her married name, the bank, assuming that it was aware of all the facts, would not only be safe in honouring the cheques, but probably would be bound to do so. A cheque given to a married woman, drawn payable in her maiden name, is clearly her property, and she has a right to endorse it in her maiden name. It is customary in such cases to have the endorsement made in some such way as this:

"Mary Jones, wife of John Smith
Mary Smith."

(There are no legal points involved in this question: it is purely a matter of identity.)

Consideration.

The second requisite of a valid contract is the presence of a consideration or inducement, value received, or loss suffered by the other party. Consideration has been defined in an English case as "some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." The purpose of the doctrine of consideration, according to Anson, is "to ascertain whether the maker and receiver of a promise really contemplated the creation of a legal liability." The term is a short way of saying, "In consideration of receiving possession of your house, I pay you $5,000."

The general rule, then, is that every valid contract must have a consideration to support it. Before examining this rule in more detail, attention may be called to certain exceptions or qualifications:

(1) The rule applies only to executory contracts, those which, in whole or part, are still to be performed. An executed contract cannot be broken simply because there was no consideration.

(2) A contract under seal requires no consideration. The seal is supposed to impart a consideration. In other words, the very formality of such a contract is evidence that both parties intended it to be binding, and since this is the object which the doctrine of consideration itself has in view, nothing more is required.

(3) While a negotiable instrument given without consideration cannot be collected by the party to whom given, it is valid in the hands of a third person, if received for value and in good faith.

Necessity. The rule that a contract is not binding unless supported by a consideration may be illustrated in the case of a gift. A mere promise to give another something is not binding, if there is no consideration. A man promises to give his son a horse six months later. The son could not enforce this promise, unless he could show that in return he had agreed to give or do somehting which he was not otherwise obliged to do. If, however, the father handed over the horse at the time

agreed, he could not later take it back because of the lack of consideration.

Again, a consideration must have value, but not necessarily value equal to the thing promised. It is for each party to the contract to determine whether the bargain is a good one. The courts will not enquire into the adequacy of the consideration. Any real benefit received or detriment suffered is enough.

A payment of a smaller sum than the amount owed is not consideration for discharge of debt. A owes B $100; B offers, if A will pay him $80, to forgive the balance; A accepts. Later, B claims the balance and can recover it. There was no consideration to support B's promise, since A had only done what he was bound to do anyway. If, however, A had agreed to pay the $80 a week earlier than required, or if in addition he had given B a mongrel pup, value unknown, the new bargain would hold.

A past consideration cannot ordinarily support a promise. If after receiving a benefit, one promises to give something in return, he cannot be held to his bargain. A falls into the lake; B rescues him; A then promises to give B $100 reward, but afterwards refuses to do this. He cannot be held to his promise. If, however, he had promised while in the water, he would be bound, or if he asked for help, the law would consider a promise implied, and when an expressed promise was substituted for the implied one it could be enforced.

If one undertakes to perform a service without recompense, he cannot be held liable if he fails to do it, but if he does undertake it and by his unskilfulness or negligence does damage, he may be liable in tort for the loss. (A tort is any wrongful act or neglect which does legal damage to another, e.g. assault, libel. It leaves the wrongdoer open to suit for damages, just as would the breach of a contract.)

Forbearance to sue, where one has a bona fide claim, may be a valuable consideration. It is not necessary that the claim be one which would be upheld in court, but it must be one which has some ground, not one which the person pressing it knows is merely a vexatious and frivolous claim, which is

bound to fail. Of course, this refers only to cases where the wrong is one against the individual and is not a criminal offence, an offence which the state of its own motion would punish: any contract to hush up a crime would not only be binding, but would expose both parties to punishment. In other words, the consideration must be legal, as well as the subject-matter (see next section). In a Quebec case, it has been held that a note given by the father of an embezzling bank clerk to the bank to cover the amount stolen, to ensure prosecution being dropped, could not be collected.

Mutual promises may support one another. If twenty creditors of a debtor agree with him and with one another to accept fifty cents on the dollar in discharge of their claims, the forbearance of each is the consideration for the others.

Examples:

Brewer v. Harvey. When plaintiff was twelve years old her father pointed out a colt and said, "This is your property, I give it to you." The father, however, kept possession until his death. Held, that contract had not been executed by delivery, and that the promise, being a gift without consideration, was not binding.

Shadwell v. Shadwell. Plaintiff's uncle wrote him as follows: "I am glad to hear of your intended marriage with E. N., and, as I promised to help you at starting, I am happy to tell you that I will pay you £150 yearly during my life, and until your annual income from your profession of chancery barrister shall amount to 600 guineas." Plaintiff married E. N., but uncle defaulted in payment. Held, that uncle had impliedly requested plaintiff to marry E. N., and that there was, therefore, consideration for the promise.

Hamer v. Sidway. Uncle promises to pay nephew $5,000 on reaching the age of twenty-one, if until then he refrains from using liquor or tobacco, playing cards or billiards for money, or swearing; nephew lives up to agreement, uncle declines to pay. Held, that as nephew had a right to do the things mentioned, his forbearance from doing so constituted a valid consideration.

Elsee v. Galward. Carpenter promises without reward, to repair a house by a certain time; does not do so and walls collapse; held, carpenter not liable.

Coggs v. Bernard. Bernard offers to carry some hogsheads of brandy for Coggs, without recompense; by his negligence one of the casks is smashed. Held that Bernard is liable in tort for the damage done.

Legal Subject-matter.

The third requisite of a valid contract is that the subject matter, the thing to be done, must be a lawful object. Obviously the state cannot give aid in performing an act which it has forbidden or which is held contrary to public policy, so if one party seeks the aid of the courts in enforcing a contract made for an unlawful purpose, aid will be denied; the contract cannot be enforced.

This principle, like the rule as to consideration, applies only to executory contracts. If the contract has already been carried out, the courts will not help one party to undo the bargain. The law will give aid to neither party.

The presumption is that all objects are lawful, unless proved otherwise. It is sufficient, then, to note the more important classes of acts that are considered unlawful, some because contrary to statutes or to common law rules, and some because contrary to public policy to enforce.

Wagers. Bets and wagers were formerly enforceable at common law, but in Canada, as in the United Kingdom, this rule has been changed by statute. The law does not ordinarily forbid the making of wagers, but it declines to give its aid in enforcing them: that is, wagering contracts are void but not illegal; and either party may, without incurring any penalty, voluntarily pay the amount bet. The winner cannot invoke the aid of the court in compelling the winner or the stakeholder to return his money, if the latter has paid it over. The court will, however, aid either party to recover his money from the stakeholder, before it is paid out, since this action prevents the completion of what the law considers an immoral act. A note given for a gambling debt is not enforceable as between the original parties, but is good in the hands of a holder in due course.

Insurance contracts, in that they depend upon an uncertain event, partake of the nature of wagers. The law accordingly imposes restrictions upon the persons who may take out policies, and, in the case of fire, marine and similar insurance, upon the amount insurable. No one can insure an object or a man's life who has not an insurable interest in it, and cannot

insure for more than the amount of that interest, if determinable. A shipowner insures his vessel with an insurance company at, say, two per cent, against risk of loss by storm, fire or capture by the enemy; on the same day a man without any share or interest in the boat or its cargo bets a friend $1 to $50 that the boat will not come safe to harbor. The risk and the odds are the same, but the first contract could be enforced in court and the second could not. As to life insurance, the interest of a man or of his wife is unlimited, while a creditor may have an interest to the extent of his possible loss by the death of the debtor.

The general principle is applied to stock exchange transactions. Where shares or produce are actually bought and sold, even on margin, the transaction is held not to be a mere wager, and is enforceable. Where the parties concerned are merely betting on the ups and downs of the market, without any intention of actually acquiring or delivering shares, i.e. in bucketshop transactions, this is held to be a mere wager and is not enforceable in a court, whatever other means of pressure may be employed to secure payment.

Sunday Contracts. The common law recognized no difference between Sunday and other days as to the legality of contracts. In several of the provinces, however, contracts of hire, the loan of money, the making and delivery of a deed, made on Sunday, are illegal by statute. The Bills of Exchange Act provides (Section 27) that "a bill is not invalid by reason only . . . that it bears date on a Sunday." It would appear, however, that if the bill is given in pursuance of a contract made the same day, and the making of a contract on Sunday is forbidden, the bill would not be good, since in that case the consideration is not a valid one.

Illegal Acts, generally. Any contract in furtherance of an act in itself illegal is void. If the law of a province forbids any one to teach in the public schools without a certificate or license, a teacher without a certificate or special license could not recover on his contract with the school trustees. If Sunday excursions are forbidden, the firemen on a Sunday excursion

steamer could not compel the company to pay them the contracted wage.

Crimes and torts. Any contract to commit a crime or a civil wrong is illegal.

Contracts in Restraint of Trade. It is a general maxim of English law that it is to the advantage of the whole community that every man should be free to seek his livelihood, use his skill and energy, when and where he pleases. On the other hand, the law recognized the existence of good will, and the desirability of permitting a man to transfer his good will to a successor by agreeing not to set up in the same business again within a certain time or distance. The rule adopted, then, is that a contract whereby a man binds himself not to compete with his successor is good in so far only as necessary to protect the latter. An agreement made by a Sherbrooke grocer with his successor not to set up in business again in the province of Quebec would exceed the protection necessary and be void.

Contracts in Restraint of Marriage. Marriage is regarded as the normal state for persons of suitable age and condition, and advantageous to the state. Accordingly contracts unduly restraining it are void. A contract binding a son never to marry could not be enforced. However, reasonable restraints, limited in time or as to special persons, are upheld, such as a contract not to marry before thirty, for valid consideration, such as an income or employment until that time. A bequest to a person who has never been married conditional on never marrying, is void, and the property can be taken minus the condition. A bequest, however, to a person who has been married once or oftener, and has thereby had his share of the burdens or privileges of the married state, as, for example, a bequest "to Mary Jane, so long as she remains my widow," is valid.

The latter two classes, acts in restraint of trade and acts in restraint of marriage, are examples of acts not illegal by common law or statute, but considered contrary to public policy.

Examples:

Universal Stock Exchange v. Strachan. A case of speculation on the Stock Exchange. Though the contract stipulated that either party might call for the shares traded in, this was not intended to be acted on, and the transaction was simply one of betting on the rise or fall of stocks and paying over differences. Held, a wager and unenforceable.

Wells v. People. Plaintiff who had no certificate was employed, at $45 a month, to teach school in a state where such qualifications were required by law; after teaching three months, he discovered that he could not collect his salary on this account, cancelled contract and made a new one for the remaining three months at $90 a month. Held, first contract void and second also, as an attempt to do indirectly what the trustees could not do directly.

Nordenfeldt v. Maxim-Nordenfeldt Co. Manufacturer of guns and ammunition, doing business with governments the world over, sells the business and patents to a limited company and agrees not to compete for twenty-five years, not only in England, but anywhere in the world. Held, in view of the special character of the business, a reasonable restraint.

Lowe v. Peers. Defendant agreed not to marry any person except the plaintiff, on penalty of paying her £1000 forfeit. Held, that since plaintiff did not bind herself to marry defendant, the contract would, in case she did not marry him, prevent him from marrying at all, and was therefore void.

Graves v. Johnson. Plaintiff sells and delivers, in Massachusetts, intoxicating liquors to a Maine hotel-keeper, who purposes to sell them in Maine, where a state law forbids such sale. Held, plaintiff cannot recover price of liquor sold.

Weidman v. Shragge. Two junk-dealers, largely controlling the business in the Canadian West, agree to fix prices and divide profits; one sues the other to compel an accounting of profits. Held, since agreement was illegal under Dominion statute, the action could not be maintained.

Mutual Assent.

The fourth requisite in a valid contract is mutual assent, a meeting of minds. There must be full, free, and definite agreement between the parties concerned as to what is to be done. To ensure such mutual assent two conditions must be fulfilled: first, an offer must have been made and accepted, and second, there must be an absence of mistake, fraud or compulsion, which prevent any real consent.

Offer and Acceptance. A contract is effected by the making of an offer and the acceptance of this offer. A declares to B, "I will sell this horse for $200." B replies, "I agree to pay you $200 for him," or words to the same effect. The contract is made.

The **offer** may be made either to a definite person or to the general public. If A makes an offer to B, C cannot claim the right to accept it. If it is made to the general public, as though an advertisement, any one who learns of the offer may accept. In a New York case, a murder had been committed and a reward offered for the capture of the murderer. A man who had not heard of the offer, captured the fugitive, and later, on learning of the reward, claimed it. The court held that he was not entitled to it, since the offer had not been made to him, had not been communicated to him, and therefore he could not claim to have accepted it.

An offer remains open until it has been accepted, or refused, or revoked, or has lapsed. It is obvious that acceptance closes the transaction, if the offer is made only to one person or when the goods or services offered are exhausted. Refusal equally ends the offer: it is not open to a man who has once refused an offer to accept it later. An offer may be revoked or recalled at any time before it is accepted. The revocation is held to take effect, not when word is sent by the offeror, but when it reaches the person to whom the offer was made. If on October 10th A, in Regina, writes offering to sell B, in Montreal, a lot for $1,000, and B accepts by mail on the 14th, the contract will be binding even if on October 13th A had posted a letter withdrawing the offer. It is not quite certain whether in the case of an offer through advertisement, a revocation by a similar later advertisement is sufficient, on the assumption that the newspaper-reading public remains constant, or whether a person who had seen the first but not the second advertisement can claim not to have been notified: the United States Supreme Court had ruled that the second advertisement is sufficient withdrawal, but Pollock, the leading English authority on Contract, rather questions the decision, in spite of its practical convenience. An offer, again, may

lapse in various ways, as by the death of either party, or by the expiry of a specified time, or by the expiry of what the court would hold to be a reasonable time. (See fifth example below.) An offer which the maker for a valuable consideration binds himself to keep open for a specified time is called an option.

The **acceptance** must be absolute and on the precise terms stipulated in the offer. If A offers to sell 1,000 bushels No. 1 Northern wheat at $1.00 a bushel, and B replies, "I will give you 95 cents a bushel," or "I will give you $1.00 a bushel if you give me six months' credit," there is no acceptance and no contract, but rather a fresh offer. If, however, A agrees to accept 95 cents per bushel, a contract is made by B's offer and A's acceptance.

The acceptance, like the offer, must be communicated to be binding. If any method of acceptance is prescribed, it must be followed. Where no method is prescribed, it may be assumed that the method followed in making the offer, whether by post or telegraph or message, or some equally expeditious method must be adopted. Provided that the acceptance is made in the prescribed way, it is held to take effect as soon as made, not when notice actually reaches the offeror; even if by some mishap it never reaches the offeror, the contract may be maintained. If, for example, offer and acceptance are alike made by post, the acceptance is binding as soon as the letter is mailed, the assumption being that the post-office is the agent of the offeror, and notice to the agent is notice to the principal. Notice of withdrawal of an offer dates from the time it is received, while notice of the acceptance of the offer dates from the time it is sent. Acceptance may be made by an act, without communicating previously with the offeror. (See seventh example below.)

It is sometimes difficult to distinguish between an offer and an invitation to make offers. If a company in calling for tenders for a building expressly states, "lowest or any tender not necessarily accepted," it is apparent it is not making an offer, but inviting others to make offers which it may or may not accept.

Questions often arise as to what conditions are part of the offer made, e.g., whether conditions printed on the back of a railway ticket limiting the liability for damage to life or baggage can be taken to have been accepted by the person buying the ticket. If the purchaser knows of these conditions, or if the seller takes reasonable means, as by printing a notice on the face requesting the purchaser to read the conditions on the back, these conditions are usually held to have been accepted.

Reality of Consent.

Mutual assent or meeting of minds involves more than the making and accepting an offer. Such assent would not exist if mistake, misrepresentation, fraud, duress, or undue influence were present. These possible grounds for voiding a contract will be noted in turn.

When it is said that **mistake** voids a contract, it is not meant that any buyer who has not made as good a bargain as he thought he was making can escape the consequences of his poor judgment. Nor is a mistake as to the law governing the transaction ground for having the contract voided. It is mistakes as to facts, and only a limited number of these, which have this effect. The chief instances are: (1) Mistake as to the nature of the transaction. No mere mistake as to the contents of a document signed, but a mistake as to the very nature of the document, an assumption that it is something entirely different in kind from what it really is, is ground for relief from the contract. (See example, Foster v. Mackninon, below.) (2) Mistake or difference of belief as to the identity of the subject-matter. If A has two lots for sale, one on the north-east and one on the south-west corner of Fourth and King streets, and B contracts to buy the first, thinking he is buying the second, he may plead mistake. (3) Mistake as to identity of the other party to the contract. If the contract is one where the personal qualifications of the other party are of importance, mistake in this particular becomes ground for release. (4) Mistake as to the other party's intention. A rather fine distinction is drawn here. If A is mistaken as to the quality of the article he is getting, and B, who has not misled A, knows that A is mistaken, there is no ground for voiding the contract.

If, however, A is mistaken as to what B is promising him, and B knows this, the contract is void. (See example, Smith v. Hughes, below.)

Misrepresentation is to be distinguished from mistake on the one hand and fraud on the other. A mistake is made by the party suffering the damage: misrepresentation is made by the party doing the wrong. Fraud consists in making a false statement knowingly, etc., whereas misrepresentation consists either in making a false statement innocently, or in withholding a fact which should have been disclosed. Innocent misstatement or failure to disclose facts does not invalidate ordinary contracts. A person may remain silent as to defects in the goods he is selling without giving ground for a charge of misrepresentation, provided he does not by positive actions give the other party any false impression. This rule is summed up in the maxim "caveat emptor," let the buyer beware. Where the buyer has an opportunity of examining the goods himself, and acts on his own judgment, whether good or bad, not on positive misrepresentations by the seller, he cannot complain if defects are later revealed. In the case, however, of certain contracts, known as contracts "of the highest faith," where one party necessarily looks to the other as his main source of information, as in insurance contracts, certain contracts for the sale of land, contracts for the allotments of shares, and contracts between persons in confidential relations, as between guardian and ward, principal and agent, lawyer and client, the party who has the means of knowing facts inaccessible to the other is bound to tell everything that might affect the other's judgment.

Fraud is a false representation, on a material point, made with a knowledge of its falseness or a reckless disregard as to whether it is false or true, made, further, with the intention of deceiving the other party, and actually deceiving him. It must be a representation of a fact and not merely an expression of opinion. Wide latitude is given for commercial puffing. If I say, "This horse is the best for the price in the whole Dominion," or "If you keep this horse until spring you can get $500 for him,"—whereas the horse does not bring more than

$200 in the spring—I have not committed a fraud, but if I say, "I bought this horse last week for $400," whereas in fact I paid only $200, that is a representatoin as to fact and, if material, constitutes ground for voiding the contract. The point must be a material one: it has been held, in company prospectus cases, that a statement that the value of assets was £301,000 when it was really only £297,000, was not material, whereas statements as to capital which erred by £50,000 in a total of £500,000 or as to the responsibility of the contractor who had engaged to complete the company's undertaking, were held material. If, again, one party knows of the falseness of a statement made by the other party, and yet considers the bargain a sufficiently good one to close the contract, he cannot later make this false statement a basis for avoiding the contract: he must actually have been deceived.

Fraud renders a contract voidable, not void. The defrauded party may either affirm the contract and bring an action for damages for deceit, or he may avoid it, provided that he does so as soon as he learns of the fraud. If he accepts any benefits under the contract after learning of the fraud he cannot repudiate it, and if he repudiates it he must restore any money or benefits received before learning of it. The party committing the fraud cannot, of course, make his own action ground for voiding the contract if later he changes his mind as to its benefits; he is bound unless the other party decides to avoid it.

Duress is some unlawful constraint imposed upon a man which forces him to do some act against his will. It may consist of actual or threatened violence or imprisonment, directed against the contracting party himself, his wife, parent, or child. The duress must be exercised by the other party to the contract or by an agent acting for him with his knowledge. Detention or damage to goods is not sufficient to establish duress, nor a threat of arrest in lawful prosecution. A contract entered into under duress is voidable at the option of the party injured.

Undue influence is a more subtle form of duress, an influence exerted by a person of superior capacity and experience

over another, usually in a relation of trust. Where the relation between the parties is such that one naturally reposes confidence in the other, as a child in his parent, a ward in his guardian, a client in his solicitor, etc., a contract favorable to the party in whom confidence is reposed is presumed to have been procured by undue influence, and the burden of proving otherwise rests upon him. An agreement procured by undue influence is voidable at the option of the injured party.

Examples:

Fitch v. **Snedaker.** Snedaker advertises reward to any person giving information that would lead to the arrest and conviction of the person guilty of a certain murder; next day Fitch who had not seen the notice, furnished evidence which led to the arrest and conviction of the murderer; held, offer to Snedaker not communicated to Fitch, and could not be accepted by him, so no contract.

Honeyman v. **Marryatt.** Marryatt advertises an estate for sale; Honeyman offers to purchase it at a certain price; Marryatt's solicitor writes to Honeyman, "Mr. Marryatt has authorized us to accept the offer; he requires a deposit of from £1,200 to £1,500 and the purchase to be completed at Midsummer Day next." Held, this was a conditional acceptance and Honeyman not bound.

Minneapolis Railway v. **Columbus Rolling Mills.** Plaintiff asked defendant's price on iron rails; on Dec. 8 defendant offered to sell plaintiff from 2000 to 5,000 tons at certain price, and added, "If accepted, we shall expect to be notified prior to Dec. 20." On Dec. 16 plaintiff wired, "Please enter our order for 1,200 tons as per your favor of the 8th." On Dec. 16 defendant replied, "We cannot book your order at that price." On Dec. 19 plaintiff wired, "Enter our order for 2,000 tons as per your letter of the 8th." Defendant refused to supply the rails; held, telegram of Dec. 16 was not acceptance, as in different terms from offer, and that this amounted to rejection of the offer, so that it was no longer open when telegram on Dec. 19 was sent.

Byrne v. Van Tienhoven. Van Tienhoven, a manufacturer at Cardiff, writes on Oct. 1 to Byrne, a merchant in New York, offering 1,000 boxes of tin plate for sale; Byrne acepts by cable on the same day the offer is received, Oct. 11, and by letter on Oct. 15; on Oct. 8 Van Tienhoven writes withdrawing his offer, but this letter is not delivered until Oct. 20. Held, that the revocation was not communicated until Oct. 20, and therefore the defendant was bound.

Ramsgate Hotel Co. v. Montefiore. On June 3 Montefiore applied for shares in the hotel company; on Nov. 23 the company accepted

his offer; held, the allotment was not made within reasonable time, and the defendant is not bound to take the shares.

Taylor v. Merchants Fire Insurance Co. Defendant company wrote Taylor they would insure his house for $57; Taylor received letter on Dec. 21, and on same day wrote accepting offer and enclosing cheque; on Dec. 22, before this letter reached defendant, house was burned down; held, contract was complete when letter of acceptance was mailed, and company therefore liable for loss.

Carlill v. Carbolic Smoke Ball Co. Company advertises it will pay £100 to anyone contracting influenza after using its remedy for a fortnight; plaintiff read advertisement, bought remedy, used it according to directions, caught influenza and sued company, which contended no contract existed because plaintiff had not notified it of acceptance. Held, plaintiff not required to notify acceptance, as performance of the condition was a sufficient acceptance.

Henderson v. Stevenson. Lieut. Stevenson bought from a steamship company a ticket for passage from Dublin to Whitehaven; ticket had on the face of it only the words "Dublin to Whitehaven," but on the back were words exempting the company from liability for loss of luggage: ship was wrecked and Stevenson sued for loss; held, condition on back of ticket was no part of the contract, as buyer had not seen it nor had his attention called to it.

Foster v. MacKinnon. Foster was holder in due course of a bill of exchange for £3,000 endorsed by MacKinnon; shown that MacInnon, an elderly man, had been told the document was a guarantee for £3,000 to enable a company to obtain advance from its bankers, such as he had signed on previous occasions; held, MacKinnon "Not liable even to bona fide holder for value, since the mind of the signer did not accompany the signature; he never intended to sign and, therefore, in contemplation of the law, never did sign the contract to which his name is appended."

Raffles v. Wichelhaus. Wichelhaus agrees to buy of Raffles 125 bales of cotton "to arrive ex Peerless from Bombay"; there were two ships named Peerless sailing from Bombay at different times, and plaintiff meant one and defendant the other; held, that in view of mistake as to identity of subject-matter, the contract was void.

Boulton v. Jones. Jones orders hose from Brocklehurst, who earlier in the day had sold his business to his manager, Boulton; Boulton fills the order under old firm name; held, no contract, since Jones thought he was dealing with Brocklehurst.

Smith v. Hughes. Smith offered to sell Hughes some oats, showing sample; Hughes accepts; afterwards refused to take oats on ground that they were new and he thought he was buying old

oats; nothing had been said at time as to whether they were old or new, but Smith knew Hughes thought they were old. Held, Hughes' mistake as to age of oats does not void the contract; to relieve him it would be necessary to prove Hughes' mistake as to a promise by Smith: "Did the purchaser think that the vendor's promise was to supply old oats, and did the vendor know that the purchaser thought that this was the promise, the vendor knowing all the time that he was promising nothing but new oats?"

Scott v. Sebright. Sebright induces young heiress to whom he is engaged, to accept bills of large amount; writs are issued against her, and much mental disturbance inflicted; Sebright declares marriage only means of escape from bankruptcy; and also threatens to shoot her if she does not marry him; she goes through ceremony, but, held that there was no real consent, and that the marriage contract, being induced by force, was not binding; the marriage was therefore annulled.

Smith v. Etna Life Insurance Co. In being examined for insurance, applicant was questioned whether he had cough or any difficulty in breathing; he replied, "No cough; walking fast upstairs or up hill produces difficulty in breathing"; proved that he had raised blood for two years, and died three months after policy was issued; held, misrepresentation of material facts in this relationship ground for avoiding policy.

Poland v. Brownell. Plaintiff bought a half interest in defendant's stock and business; he looked over the stock and examined the books; held, that he could not bind the seller by representations made as to the value of the goods or amount of the business done, found afterwards to be exaggerated; caveat emptor.

Questions for Review.

1. What is the advantage to a business man of a knowledge of his legal rights and obligations? Distinguish between "a law" and "the law." What is public international law? Is it rightly termed law? What is the difference between criminal law and civil law? May the same act be at once an offence against the state and a wrong to an individual?

2. What is the origin of common law? How far can judges be said to make law? What is the system of case-law? What are legal codes? What are the advantages and what the disadvantages of the case-law system? What was the origin of equity? Are there now separate equity courts? What is the

relation between the common law and statute law? What was the law merchant? When did it develop?

3. What is the importance of Roman law for the modern world? Why is Roman law the basis of Scotch jurisprudence? In what parts of America is Roman law the basis of the legal system? Why? Why it is that the English Statute of Frauds, passed in 1676, was not supposed to be part of the law of the Canadian Northwest, while it was part of the law of Nova Scotia? Why are recent English decisions quoted in United States courts? What law was in force in Quebec under the French régime? What compromise was effected in 1774, and why? What led to the drawing up of the Civil Code of Quebec in 1866? In what way has the Code Napoleon influenced Quebec law? Summarize the sources of the law in force in Canada.

4. What is the importance of contracts in commercial law? What is the difference between formal and simple contracts? In what cases is a seal required? What substitute is now used for a wax seal? What are implied contracts? Distinguish between executed and executory contracts, between valid, void and voidable contracts.

5. What are the essential elements in a contract? What is meant by legal competency? Who are minors? If you were born on Dec. 1, 1890, at 9 a.m., when do you become of age? Are a minor's contracts void or voidable? What is the difference between executed and executory contracts? Can the other party to a contract with a minor repudiate it? What are necessaries? Must a minor stand by all contracts for necessarise? For what obligations of a minor are his parents liable? What are the differences between the law of Quebec and the law of the other provinces as to minors?

6. What was the status of a married woman under the common law? What changes have been made by statute? What have been the reasons for this change in attitude? Why is a different rule in force in Quebec? Which do you consider the better plan, and why? What is meant by community of property? Who is the managing partner in such a case? What limits are set upon married women's deposits and withdrawals

in a bank in Quebec? How may these limits be exceeded? May a minor have a bank deposit over $500? an overdraft?

7. What is an alien enemy? an alien friend? What becomes of a life insurance policy held by a German in an English company, during war between England and Germany? Under what circumstances can an insane person make a valid contract? What is the difference between insanity and idiocy? Is a contract made by a man so drunk as not to know what he is doing, void or voidable? What is meant by avoiding a contract? What differences, if any, are there between the contracts of insane persons and of minors, in the eyes of the law? What limitations are there upon the contractual capacity of a corporation? What is the point in each of the cases cited at the end of this section? May minors open savings bank accounts in their own names? Is a married woman's endorsement for her husband valid? How should a married woman endorse a cheque made payable in her maiden name?

8. What is a consideration? What is the purpose of the doctrine of consideration? If a friend asks you to dinner, and breaks his engagement, have you a legal remedy? Why does a contract under seal not require a consideration? May an executed contract be declared void for lack of a consideration? Is a past consideration sufficient support for a promise? What is the liability of a person who agrees to perform a service gratuitously, and fails to do so? In what circumstances may forbearance to sue be a valid consideration for a bargain? What is the point in each of the cases quoted?

9. What is a legal subject-matter? Is it illegal to pay over money lost on a wager? Can the winner enforce such payment? Can the loser recover his deposit from the stakeholder, after it is made clear that he is the loser, but before the stakeholder has paid it to the winner? In what way do insurance contracts partake of the nature of wagers? How have the possibilities of gambling through insurance contracts been reduced? What other reasons are there for restricting the liberty of outside parties to take out insurance upon the life of another man? What stock exchange transactions are valid? Even if not legally enforceable, how may such obligations be

enforced? Is a note bearing a Sunday date valid? dated on Christmas? May the goodwill of a business be transferred? What limits are set to agreements not to compete in trade? Why are contracts in undue restraint of marriage void? Under what circumstances are contracts in restraint of marriage valid? Is a condition in a bequest to a young widow of twenty-five, binding her never to marry again, valid? What is the point in each of the cases quoted?

10. What is involved in mutual assent? To whom may an offer be made? By whom may it be accepted? How may an offer in an advertisement be withdrawn? When does the revocation of an offer take effect? When does the acceptance of an offer take effect? When and how must the acceptance be made? Is a company calling for tenders making an offer?

11. What is mistake? Are there many instances in which a contract can be avoided because of mistake? Do you know of any attempts made to induce a man to sign one kind of document when he thought he was signing another? Would a man be relieved from his obligation if he had not noticed that the note he was signing was for $1000 instead of for $100, as he had intended? What is the point in Smith v. Hughes? Distinguish between misrepresentation and fraud? What is the rule, caveat emptor? Under what circumstances does it apply? What conditions must be present before fraud can be established? What is the difference, in legal effect, between mistake and fraud? What is duress? Undue influence? What is the point in each of the cases cited?

Questions for Written Answer.

1. Write a brief note on the origin, development and extension of the common law of England.

2. Explain why the law of Quebec differs in many important particulars from the law of the other provinces, and give instances of the difference.

3. Give your opinion briefly upon the following points:

(a) Wilkins gives Thomson a power of attorney to sell his farm. Thomson sells it, and makes the deed, to himself. Is the contract valid?

(b) Corlies asks White for an estimate of the cost of fitting up an office. White makes an estimate (not an offer). Corlies then writes White that if he will do the work within two weeks he may begin at once. White does not reply, but buys lumber and begins work on it at his shop. Next day Corlies countermands the order. White sues for breach of contract.

(c) A young man, 19 years of age, engages a room for forty weeks at $4 a week. At the end of six weeks he leaves, without paying anything, and the landlady, who is unable to secure another lodger, sues for $160.

(d) Williams, a minor, agrees to purchase Steele's automobile for $1000. After he comes of age, Steele sues him for damages for failure to take the car.

(e) Gibson voluntarily supplies necessaries to Evans' father, who was in poor circumstances. Evans afterwards promises Gibson to pay for them, but later refuses. Gibson sues.

(f) Blake writes Allen on May 1, offering house for $10,000: Allen on May 4 replies by post accepting offer; letter reaches Blake on May 6, but the day before he had sold the house to another person, and notified Allen of this by post. Can Allen recover damages?

(g) Miller sells Smith cattle, knowing they had Texas fever, a disease not discoverable by examination, and not saying anything of this. The cattle die, and Smith sues for the price paid.

4. Answer any one of the Review questions in full.

5. Have you any difficulties to bring up?

LESSON II.

Operation and Discharge of Contracts

Read Geldart, Chapter VI.

Who have Rights and Liabilities under Contract?

Once a valid contract is formed, the next questions that arise are, Who is liable under the contract? Who has rights under it? Can these rights and liabilities be transferred to others?

Original Contract. The general rule is that only the parties to the contract acquire rights or incur liabilities under it. If M promises N that Q will do a certain thing, Q of course is not bound to do it. If A makes a contract with B to confer some benefit on X, B has the right to sue A if he does not carry out his bargain, but X has no right to do so. This, at least, is the well-established rule in England and in the English-law provinces of Canada. In most of the states of the United States, however, X would be permitted to sue to enforce the claim, particularly if he could show that B was under an obligation to him, which B sought to discharge by making the agreement he did with A. In Quebec, the Civil Code provides (sect. 1028 seq.) that while a person cannot, by a contract in his own name, bind any one but himself and his heirs and legal representatives, he may contract in his own name that another shall perform an obligation, and in this case he is liable in damages if such obligation be not performed by the person indicated; in like manner, a party may stipulate for the benefit of a third person, when such is the condition of a contract which he makes for himself or of a gift which he makes to another; and he who makes the stipulation cannot revoke it, if the third person has signified his assent to it. Under Quebec law, therefore, this third person, if he has signified his acceptance of the stipulation, may take action to enforce perfromance. (See Lesson XII.)

The rule that a principal may acquire rights or incur liability by the acts of a duly authorized agent is not an exception to the general rule, since the agent is not strictly a third

person, but as it were the principal himself: **qui facit per alium, facit per se** (see later lesson on Principal and Agent).

Again, though no contractual liability can be thrown upon a person by a contract to which he is not a party, yet a duty with respect to it may be thrown upon him, a duty of non-interference, and if he interferes, if he induces either party to break his bargain, he may be held liable in tort to the other party.

Examples:

Price v. Easton: William Price owes John Price £13; he promises Easton to work for him and to let Easton withhold his wages until £13 accumulates; Easton promises William to pay this amount over to John. Later, John seeks to sue Easton for breach of this contract. Held, he is not a party to it, and cannot sue.

Schmaling v. Thomlinson: Thomlinson employs certain brokers, Z and Co., to have certain goods carried for him; Z and Co. make arrangements with Schmaling to do the work; Schmaling does so, and later sues Tomlinson for compensation. Held, he had no right to sue, as his own contract was with Z only, and Thomlinson was not a party to it.

Lawrence v. Fox (New York case): Holly owes Lawrence $300; at request of Fox, he lends this amount to the latter, who, in turn, promises Holly that he will pay the sum to Lawrence when due, one day later; Fox does not pay it over, and Lawrence brings suit against Fox. Held, that though not a party to the contract, he can recover under it.

Lumley v. Gye: Lumley, manager of Opera House, engages exclusive services of singer; Gye, a rival impressario, induces her to break her contract; Lumley sues Gye for damages for breach. Held, that Lumley had right of action, not only for procuring breach, but under special rule that anyone interfering in contract between master and servant is liable.

Assignment of Rights. Third persons may come to be concerned in the contract, however, by developments after the bargain has been made. Rights under a contract, unless one for personal services, may be assigned or transferred to a third party. A tenant, unless prohibited by the terms of the lease, may assign or sub-let his interest in the lease. A merchant who has sold goods to a customer may assign to a collecting agency his claim for the amount owed, giving due notice to the debtor. In addition to such instances of assign-

ment by fresh contract, we have instances of transfer by operation of law, as when the rights under contract of a bankrupt, as well as his other property, pass to the assignee or trustee, or, as by death, when all rights under contract pass to the executor or administrator.

Assignment of Liabilities. Liabilities, on the other hand, may not, as a rule, be assigned to another, unless with the consent of the party to whom the service or good is owed. It is assumed that the credit and capacity of each party to the original contract was a consideration to the other in inducing him to make it, and that no third person can be substituted without consent. If A has a contract with a famous painter X, whereby the latter is to paint a portrait of A's wife, X cannot assign this to some third-rate dauber, or even to another painter of equally high reputation with his own. Where, however, there is no question of personal skill or taste, the person liable under the contract may have some other person perform it for him, but he will remain liable for its proper performance. Where a certain liability or easement is attached to a piece of land, as, for example, a restriction against building within a certain distance of the street, this obligation passes with the land. Again, if a party to a contract dies, his liabilities, as well as his rights, pass to his heirs or representatives. If the heirs accept the rights, they must also accept the liabilities.

The distinction should be remembered between assignability and negotiability. As will be considered in detail later, in the chapter on Negotiable Instruments, negotiability implies: (1) That the contract may be passed from hand to hand without notice to the party under liability that the transfer has been made, and (2) that the transferee for value and in good faith of a negotiable instrument holds it free from any defects in title which might have been urged against the original possessor.

Examples:

Robson v. Drummond: Coachbuilder agrees to supply Drummond with a carriage for a term of five years, at 75 guineas per year; later he sells his business; Drummond refuses to continue contract

with successor, who sues; D. urges that the contract was personal and that he relied on the taste and skill of the first builder; held, D. entitled to refuse to pay.

A v. B: Plaintiff was assignee of a contract for the delivery of ore in 100-ton lots for smelting; the price to be paid for the ore was to be ascertained by an assay made after delivery; from delivery until the price was thus ascertained and paid the defendant had no security for payment except in the character and solvency of those who received the ore; held, therefore, that such a contract was not assignable, without plaintiff's consent.

Discharge of a Contract.

There are many ways in which a contract is discharged or ended. We may note here only the more important, discharge by agreement, by performance, by impossibility, by breach, and by operation of law.

Discharge by Agreement. An agreement to discharge a contract under certain conditions may be contained in the contract itself, as, for example, a clause in a fire insurance policy providing that the policy will lapse if at any time the house is left untenanted for thirty days. Or by a fresh contract the parties may later agree, before either has executed his part, to discharge the contract. The consideration is the mutual release of A by B and B by A from any further liability. If, however, A has already executed his part, while B has not, the new contract must be under seal or must contain a fresh consideration.

Discharge by Performance. The normal method of discharging a contract is by both parties carrying out its terms. Since each has done what he promised to do, the contract is at an end.

Performance must ordinarily be full and exact. In contracts, however, for building or other work, where there are many specifications, trivial and unintentional defects may be overlooked on the ground of "substantial performance," subject to deduction for the shortcoming.

In case of a contract providing for the payment of money by one to the other, it is the debtor's duty to seek out his creditor and pay him, not to wait until a demand has been

made upon him. If no place of payment is mentioned, the money will be payable at the domicile of the creditor. Payment may be made by cheque or one's own note, if acceptable to the creditor, but, unless it is expressly agreed otherwise, such a cheque or note acts only as conditional discharge, and if it is not paid at maturity, the creditor may either sue on it or on the original contract. The note of a third party, however, if accepted, acts as a complete discharge. Of course, if the debtor endorsed the note in the ordinary way, his former creditor could take action against him as surety in case the maker fails to meet it.

A legal tender is an offer to pay or do what is called for by the contract. The tender must be absolute and unconditional, and, if in money, in lawful money of the country, not in cheque or other bill. By the Dominion Currency Act, a legal tender may be made in Canadian copper coins up to twenty-five cents, in Canadian silver up to ten dollars, and in gold coins and Dominion notes to any amount. British sovereigns and American eagles (with halves and multiples) are equally legal tender with Canadian gold coins. The exact amount due must be tendered, no change being asked for. Of course, the creditor may waive his right to insist upon any of these details. If a legal tender is made in this way, and the creditor declines to accept it, this refusal does not discharge the debtor, but it does release him from payment of interest and of costs. If, later, the creditor sues, the debtor may pay the money into court, plead tender, and, if he establishes the plea, the creditor will have to bear the whole court costs.

In case of a dispute as to the amount due, one party, desiring a friendly settlement, and willing to make a concession to secure it, may offer to pay more than he considers is really due. To prevent this offer being construed as evidence against him, it should be marked, "Without prejudice."

Where a debtor who owes more than one debt to the same creditor makes a payment, he has the right to say on which debt the payment is to apply. If he does not exercise the right, the creditor may apply it toward any debt he pleases. If neither makes a choice, and the matter comes before the courts,

the court would apply the payment on the debt that is most burdensome to the debtor, the one that he has the greatest interest in paying, for example, on a mortgage rather than on an unsecured debt, on a judgment rather than on a chattel mortgage. If it is on a book account, the court will apply it to the items of longest standing, provided they are not barred by the Statute of Limitations.

Examples:

Nolan v. Whitney: Nolan, a contractor, agrees to build a house for Whitney according to certain specifications Whitney refuses to pay on ground that plastering was defective; court found that contractor had acted in good faith and had substantially performed his work, except for minor defects in plastering, and held, therefore, that he could recover, compensating Whitney for the said defects.

Mills v. Fowkes: Fowkes owes Mills £100, which is barred by the Statute of Limitations, and £150 which is not barred; he pays £15 "on account"; Mills sues for £250; Fowkes pleads that the £100 is barred and that the £150 should be only £135; Mills replied that as the £15 was paid generally on account, he appropriated it to the statute-barred fund. Held, he could do this and recover the full £150.

Discharge by Impossibility. If the impossibility existed from the beginning, as in the case of the sale of a ship which had already been lost at sea, the contract is void; through mistake, if neither party knew of the loss; through lack of consideration, if one party did. Usually, however, the impossibility arises later. Observe that the term is construed rather strictly. Mere financial loss owing to changed conditions does not constitute impossibility. Nor is a contract discharged if the thing promised, though impossible under the special circumstances, was not so in its nature: in an English case, Kearson v. Pearson, one party agreed to deliver a cargo on board in a certain time; owing to delays caused by the ice, this was impossible, but the court held that this was not ground for a discharge, in other words, that the contractor was liable for damages for failure to do what he had promised.

Among the clearly recognized instances of impossibility may be noted legal impossibility, as where a contract to erect a frame dwelling in Ward 2 is overridden by a city ordinance

forbidding the erection of any frame building in future within the fire-limits; personal incapacity, by death or insanity, or, in the case of contracts requiring special personal abilities, by serious illness; and, finally, the destruction of the subject-matter, if a certain, specific thing.

Examples:

Kearson v. Pearson: Pearson contracts to load a ship with 110 tons of coal at a certain dock at rate of 20 tons per day; coal had to come to the dock by a canal; the canal was frozen, and it was impossible to bring the coal to the dock. Held, this did not excuse the contractor.

Anderson v. May: Anderson contracted in March to grow and deliver to May 591 bushels of beans, but actually delivered only 152 bushels because most of his crop was destroyed by an unusually early frost. Held, that this did not excuse non-performance.

Taylor v. Caldwell: Caldwell agreed to take for four days a Music Hall belonging to Taylor, for the purpose of giving concerts in it; a week before the first performance was due, the Hall was burned. Taylor sues for breach of contract. Verdict for defendant: "in the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given."

Krell v. Henry: Henry agreed to take Krell's flat for two days in June, 1902, in order to have a view of King Edward's coronation procession when it was announced that the coronation and procession were not to take place, Henry refused to pay anything beyond the deposit already made; Krell sues. Held, that the taking place of the procession was regarded by both parties as the foundation of the contract, and that the plaintiff was not entitled to recover.

Discharge by Breach. A contract, again, may be discharged by breach, the failure or refusal of one or both parties to carry it out. In such a case there rises, in place of the contract rights and obligations, a new right of action for damages and a new obligation of the other party to pay the damages.

The contract may be broken in various ways, by notice of intention not to fulfil it, by conduct making it impossible to fulfil it, and by whole or partial failure to fulfil it.

When one party to a contract, before performance is due, notifies the other that he does not intend to perform it, a breach of contract arises and the injured party is discharged and may at once bring suit for damages. If part of the con-

tract has been fulfilled, and one party gives notice he does not intend to complete it, the other may bring suit, and must stop on his own part if continuing would increase the damages.

If one party to a contract puts it out of his power to fulfil it before performance is due or completed, the other party is discharged and has a right of action for damages.

If one party fails to do what he undertook to do, the other party usually is discharged. If, however, the contract is divisible, that is, if the court holds that it is really a series of contracts, as for the delivery of so many thousand bushels of grain each month, the whole contract is not held to be discharged by failure to complete one instalment, according to English courts at least. The injured party, in the latter case, must go on to carry out his own promise, securing merely the right to recover damages. Where the contract is indivisible, the injured party is freed from his obligations and also has an action for damages. A subsidiary promise in a contract may be broken; if not defeating the main object of the contract, this does not discharge the other party, but simply gives ground for damages: it is considered in such case a "representation" and not a "condition."

The object of giving damages is to compensate the injured party for his actual loss, not to punish or fine the party in default. The contract may itself stipulate certain damages for breach. If not, the jury or judge will endeavor to assess them fairly. The general rules as to damage are: the injured party should, as far as possible, and as far as money can do it, be placed in the same situation as if the contract had been performed; "the damages," the court laid down in the ruling case of Hadley v. Baxendale, "should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it"; any damage not falling with this rule, though in fact caused by the breach, is held "too remote"; the court will not take into account numerous results of a contingent nature,

each depending upon the previous step, in considering the probable loss.

Examples:

Hochster v. De la Tour: De la Tour agreed to employ Hochster as courier, to begin on June 1st, but before that date he notified H. he would not require his services. On May 22 plaintiff issued writ for breach of contract, and recovered damages.

Hadley v. Baxendale: Plaintiffs, owners of a flour mill, sent a broken shaft to the office of the defendants, common carriers; defendant was told article was a broken shaft, and that it must be delivered immediately, but was not told that it was being sent to maker as pattern for new shaft nor that the mill would be stopped till the new shaft arrived; there was delay in delivering the old, hence later the new shaft was delayed, the mill closed and profits lost. Held, that the plaintiffs could not recover damages for lost profits: "in the great multitude of cases of millers sending off broken shafts to third persons by carrier, such consequences would not, in all probability, have occurred, and these special circumstances were here never communicated to the defendants. . . The loss of profits cannot reasonably be considered such a consequence of the breach of contract as would have been fairly and reasonably contemplated by both parties when they made the contract."

Hobbs v. L. & S. W. Ry. Co.: Plaintiff took tickets for himself and family by midnight train running to Hampton Court; train went to Esher instead; the partly were unable to secure lodgings or a conveyance and walked home four or five miles in the rain; the jury awarded £8 damages for inconvenience suffered by having to walk home; Court agreed this was a natural result of the breach of contract and one which the parties would have so contemplated; the jury also awarded £28 for medical attendance to wife, who caught cold in the walk, but Court held this damage was too remote, and could not be recovered.

Smith v. Green: Green sells a cow to Smith, a farmer, warranting her free from foot-and-mouth disease, though, as a matter of fact, affected with it at the time; Smith put the cow with his herd, and other cows were infected and died; Green must have known that the farmer would place the cow with the others and what the result would be. Held, therefore, that he must pay for all the cows lost.

Beeman v. Banta: Banta contracted to build a refrigerator for plaintiff, who sold poultry in city markets, and, knowing that the plaintiff intended to use it at once to freeze chickens to keep until May, warranted that the freezer would keep them in perfect shape; refrigerator failed to do so, and many spoiled. Held, that plaintiff

could recover as damages the difference in values of the refrigerator as properly built and as actually built, and also the market value of the chickens lost, less the cost of marketing them.

Discharge by Operation of Law. Bankruptcy affords an instance of a contract being discharged by the operation of a rule of law. The effect of a discharge in bankruptcy is, usually, to relieve a debtor from all liabilities provable under his bankruptcy. The chief exception is that the discharge does not release the bankrupt from any debt incurred by fraud. The Dominion Government alone has the power in Canada to pass a Bankruptcy Act in the full sense of the term, an act, that is, under which an insolvent debtor can be compelled to assign for the benefit of his creditors, and under which he can obtain release from further claims. Such an act was passed in 1869, but, though radically amended in 1875, it was repealed entirely in 1880. The reasons for the repeal were, the belief that it encouraged laxity and fraud among debtors (the years 1873-1880 were far the most serious Canada has ever known so far as magnitude of commercial failures was concerned) and a prejudice among the representatives from the farming districts based on the fact that the privileges of the act were granted only to "traders" and not to farmers. Later the various provinces passed laws which partially cover the ground, preventing insolvent traders from fraudulently disposing of their assets or from giving one creditor an unfair preference over others. Such laws, however, do not discharge the debtor in full, and if he wishes to engage in trade again he usually does so in his wife's or some other person's name. In 1920 an important new Federal Bankruptcy Act went into force. (See Chapter XI.)

Statute of Limitations. Lapse of time does not operate as a discharge to the contract, but it may prevent a person from bringing an action to enforce it. The reason for this rule is that after lapse of time it may be difficult for a debtor who has good grounds for refusing to pay to prove that fact. If the creditor does not enforce his claim in a reasonable time, the presumption is that there was some good reason why he feared to bring suit. (In Quebec, however, not only is the

right of action barred after the specified time expires, but the debt is cancelled.)

In all the provinces of Canada laws have been passed providing that actions based on certain contracts must be brought within a certain time, to be maintained. The time differs for each province and for each class of contract. The statute begins to run at the time the complaining party was first entitled to bring his suit. Thus, when goods are sold with three months' credit, the six years or other period allowed are counted from the time when the credit expired and not from the date of sale; and in the case of a bill of exchange the time is counted from the date when the bill became payable. In case the person entitled to sue is a minor at the time the action becomes possible, or insane, or, perhaps, imprisoned, the statute will not begin to run until after the disability ceases; if, however, it had already begun to run before the creditor became, say, insane, no deduction or postponement of the normal term is made. If the debtor is absent from the country at the time the action arises, it may be brought within the specified number of years after his open return. The right of action may be renewed or extended by (1) part payment of the debt, (2) payment of interest, (3) a written acknowledgment of the debt. The period within which action must be brought begins to run afresh from such payment or acknowledgment.

In merchants' accounts each purchase is treated separately; each item is outlawed in six (or five) years from the date of purchase, or of payment, if specified credit has been granted. Inclusion of several items of different dates in one bill does not merge items into one debt, to run from the last date; but by agreement between debtor and creditor an "Account Stated" may be drawn up, merging all items in one debt.

Periods of Statutes of Limitations

	P.E.I.	N.S.	N.B.	Que.	Ont.	Man.	Sask.	Alta.	B.C.
Promissory Notes	6	6	6	5	6	6	6	6	6
Interest and Rent	6	6	6	5	6	6	6	6	6
Merchants' Accounts	6	6	6	5	6	6	6	6	6
Judgments	20	20	6/20	30	20	10	12	12	20
Mortgages on Real Estate	20	20	20	30	10	10	12	12	20
Chattel Mortgages	20	20	20	..	20	20	20	20	20

Statute of Frauds.

Reference may be made here to a famous English law, the Statute of Frauds, passed in 1676, and since adopted, with slight variations, in practically all the English-speaking world. Its purpose was to prevent fraud and perjury in assertions as to contracts. The law of Canada on this subject, particularly as embodied in provincial Sales of Goods Acts, and in the case of Quebec, with some variations, in an article of the Code, provides that certain contracts, to be enforceable, must be in wrting; these contracts include:—

(1) Leases of land for more than three years (these must be under seal).

(2) Sales of land or any interest in land.

(3) Agreements which by their terms are not to be performed within one year.

(4) Promises to answer for the debt or default of another.

(5) Agreements made upon consideration of marriage (not including a promise to marry itself).

(6) Contracts for sale of personal property, of value stated below, unless contract is otherwise ratified by part of goods being delivered and accepted, or part of the purchase price being paid: in Prince Edward Island, $30 up, in Nova Scotia, New Brunswick and Ontario, $40 up, and in the rest of Canada, $50.

Questions for Review.

1. Who acquire rights under a contract? incur liabilities? What is the standing of the person for whose benefit a contract is made? in England? in New York? in Quebec? What is the point in each of the cases cited?

2. May all rights under contracts be assigned? If not, how is the dividing line drawn? How may contract rights be transferred otherwise than by fresh contract? In what cases may you transfer your liabilities? Can you accept an estate and refuse to accept its liabilities? What is the difference between negotiability and assignability?

3. Give an instance of discharge of a contract by agreement. What is meant by substantial performance? Where should a debt be paid? Is a cheque or note complete discharge

of a debt? What is legal tender in Canada? What is the effect of making a legal tender, if it is rejected? What is meant by "without prejudice"? What are the rules for deciding upon which of several debts due a given payment is to apply?

4. In what circumstances does impossibility of performance discharge a contract? Give instances where the contract is not discharged, even though one party to it could not humanly carry out what he had undertaken. What is meant by breach of contract? To what rights does it give rise? What is the difference between being discharged from the contract and being given a right of action? What is the object of damages? the rule as to the amount?

5. What is the purpose of a bankruptcy law? How may it be perverted? Have we a banyruptcy law in Canada? any similar legislation? What is the Statute of Limitations? When does the time begin to run? What happens in case of the creditor's insanity? the debtor's absence? How may the right of action be extended? What is the rule as to items in a merchant's account? What is the period in each class of contract? What is the purpose of the Statute of Frauds?

Questions for Written Answer.

1. Answer any one of the first four review questions above.

2. Explain the Statute of Limitations and the Statute of Frauds.

3. State what you think would be the finding in each of the following cases:—

(a) Hobson employs Jones to work on his farm; after Hobson's death, his executor refuses to keep Jones, who sues under his contract.

(b) Buxton owes Grant $1,989.25; he offers in payment 25 Canadian cents, nine dollars in dimes, and one thousand nine hundred and eighty one-dollar bills. Grant refuses to accept, on the ground that the money is too inconvenient to be carried reasonably.

(c) If Buxton had given Grant a note in favor of Buxton signed by William Price, and Price later refused to pay, what would be Grant's right?

(d) Draper orders a suit from his taailor, declaring that he will not accept it unless satisfactory to himself. Third parties consider it satisfactory, but Draper does not.

(e) Draper orders a machine for his mill, specifying that it is to be installed and put into satisfactory working order. Experts declare it does work satisfactorily; Draper declares he is not satisfied.

(f) Andrews gives Lister a promissory note for $400, due January 10, 1905; he fails to meet it at maturity, and a month later leaves the province, Saskatchewan. He returns October 1, 1911, with new-found wealth, and Lister next week brings suit for the amount of the note and interest; Andrews offers the Statute of Limitations as defence.

(g) Minnes is engaged by a school-board to teach nine months at a salary of $100 a month, beginning October 1st; September 25th they notify him that on account of an epidemic of diphtheria they will close the school for the term, but decline to make him any recompense. Minnes makes no attempt to secure other employment, and at the end of the nine months sues the board for the full salary.

LESSON III.

Special Contracts: Sale of Goods

Having thus surveyed some of the more important rules as to contracts in general, we may next take up certain special contracts:

Contracts as to Goods	Sale.
	Bailment.
	Insurance.
Contracts as to Credits	Surety.
	Negotiable Instruments.

Sale.

Definition. Under Sale of Goods is comprised a very large proportion of the contracts which are daily being made in business. A contract of sale of goods is defined in the English Sale of Goods Act as "a contract whereby the seller transfers or agrees to transfer the property in goods for a money consideration, called the price."

Note in the first place that the sale is a sale of goods, of personal property, as distinguished from real property or immovables. Real property includes all estates (or rights) in land except leaseholds and liens. Personal property includes all movables, such as a ton of coal or a thousand of brick, goods on the merchant's shelf, grain in the farmer's barn, the cattle in his field, the bonds in the banker's vault, and also leasehold estates in land and liens upon land.

Three important contracts often made in relation to personal property are contracts of bargain and sale, barter, and bailment. These require to be distinguished. A contract of **barter** is an exchange of one article of personal property for another. A contract of **bailment** provides for the delivery of personal property in trust to a second party, for some specific purpose, upon the condition that it is to be returned or redelivered upon completion of that purpose, as, shipping goods over a railway, putting a horse in a livery stable for board, depositing valuables with an innkeeper. A contract of bargain and **sale** implies the transfer of the title to personal property in exchange for a money price.

Other terms in common use are, **pledge** or **pawn,** (a bailment) delivery of goods to another as security for debt, possession but not title passing; **lien,** or the right to hold and possess another's property until some claim has been satisfied; **mortgage,** or the transfer of title to another as security, the title passing conditionally, but possession usually not passing.

The term contract of sale includes both actual sales and agreements to sell. In a sale the title passes; in an agreement to sell the title is to be transferred at some future time. (1) "I will sell you this bookcase for $25." "Agreed." This is a sale; title passes at once, and if the bookcase is burned before delivery, the loss falls on the purchaser. (2) "I will sell you this bookcase for $25 in six months, when I am through with it." "I accept." This is an agreement to sell; the title and the risk remain with the old owner until six months later, when both pass to the buyer and the agreement to sell becomes a sale.

Parties to the Sale. All the rules as to competency of parties, legal subject-matter, consideration and mutual assent noted as applying to contracts in general, apply to contracts of sale. A few points require special mention, and, first, the question of the parties.

As a general rule only one who has a title to property can sell it and give a good title. The purchaser in such a case gets only as good a title as the seller had, and no better. If A finds or steals a watch, and sells it to B, who pays a reasonable sum in good faith, B may be compelled to return the watch to the original owner without receiving any compensation; for compensation he must look to A or nowhere. There are, however, certain important exceptions to this rule:

(a) Stolen money, if recovered by other parties for value and in good faith, cannot be recovered, and so with negotiable instruments payable to bearer or endorsed in blank, if the person who signed them has been guilty of neglect contributing to the theft.

(b) By the English rule of "market overt," where goods are sold in certain open (overt) markets, open, public and legally constituted markets, and the buyer purchases them in

good faith and without notice of defect in title, the buyer secures a good title. Where, however, the goods have been stolen and the offender is convicted the goods again become the property of the original owner, even though sold in the meantime in market overt or otherwise.

(c) In Quebec the general rule is that the sale of a thing which does not belong to the seller is null, and the exceptions are (1) that if a thing lost or stolen be bought in good faith in a fair or market, or at a public sale, or from a trader dealing in similar articles, the owner cannot reclaim it, without reimbursing to the purchaser the price he has paid for it; (2) if the thing lost or stolen be sold under the authority of law, it cannot be reclaimed.

(d) By Factors Act or similar legislation it is usually provided that commission merchants may give a good title, even though violating secret instructions from the shipper. It is customary to ship goods to such merchants to sell on whatever terms can be secured, and the law intervenes to protect innocent purchasers against loss. If A ships a load of peaches to a commission merchant X, with instructions to hold them at 50 cents a basket, and X sells to M, who is not aware of this restriction, at 45 cents, A cannot recover the peaches from M.

Form of Contract. As was noted in the previous lesson, the Statute of Frauds and similar legislation prescribe that in certain cases a written memorandum of a contract must be made, or the contract be bound otherwise, either by delivery and acceptance of part of the goods or by part payment. In the various provinces of Canada the rules are approximately the same, the chief variation being in the amount of the transaction necessary to bring it within the rule—$30 in Prince Edward Island, $40 in Nova Scotia, New Brunswick and Ontario, and $50 elsewhere in the Dominion. Up to these amounts, bargains for sale by word of mouth, if provable, are just as binding as written contracts.

The written note or memorandum need not be a formal contract. It must, however, designate the parties by name or description, the goods sold, the price, if agreed on, and must show directly or indirectly the nature of the promise of the

party to be charged. It need not have been written at the time the contract was made, but must have been written before the action was brought. It may be addressed to a third party, or be simply an entry in a diary. It need be signed only by the party who is sought to be charged, or his agent. An auctioneer is the agent of both buyer and seller for the purpose of making the memorandum required.

In a simple form like the following, both parties are bound; if only Jones had signed, he could not bind Ross to sell, but he could be compelled to buy, and vice versa if only Ross had signed:

> William Ross has sold to John Jones 1,000 bushels No. 1 Northern Wheat at $1.00 a bushel, to be delivered by August 10, 1910.
>
> William Ross.
>
> Winnipeg, July 10, 1910. John Jones.

A formal bill of sale, corresponding to a deed of real property, is used for transactions of large amounts, but may be used in any sale.

The Passing of Title. When does the title pass from seller to buyer? This is important to determine, because from that moment the buyer stands all risk of loss and also is entitled to all gain. The answer to this question will determine, also, the nature of the remedy to be sought if the contract is not carried out.

First, as to specific or ascertained goods, that is, for definitely known and marked off goods. If the goods are ready for delivery, the title passes to the buyer immediately when the contract is made, even though payment or delivery or both may be postponed. If the seller is required to do something to the goods before they can be ready for delivery, the title does not pass until this is done.

> Example: A buys a suit of clothes from the X Trading Company, it being agreed that the suit is to be delivered and the price paid three days later. Next day the store, and with it the suit, is burned up. The loss is A's. If, however, A purchased the suit conditionally on its being altered in certain ways, the suit to be delivered as soon as altered, and the store and suit were burned before this was done, A is not bound to pay: title has not passed.

Next, as to unascertained goods, title does not pass to the buyer until the goods are ascertained and appropriated with the consent of both parties.

Example: A buys twenty horses out of a herd of fifty; the contract is not complete, and title does not pass, until twenty have been designated and marked off from the rest.

However, while ordinarily risk follows title, this may be changed by express agreement.

Example: X buys a piano on the instalment plan from W who stipulates that he is to retain the title until the piano is paid for, but that the risk is to remain in X. In case of fire X must suffer the loss, completing his payment to W.

Conditional Sales.

Goods may be sold subject to some condition, which may or may not be performed.

Sale on Trial. A common form of conditional sale is sale on trial or approval. The goods are delivered subject to the approval of the intended purchaser. They will be taken to have been accepted if not returned at the time stipulated, if any time has been mentioned, or, within a reasonable time, if no limit was set. Title does not pass until a decision has been come to or the time-limit has expired.

Sale on the Instalment Plan. Articles such as agricultural implements, pianos and sewing-machines are often sold on the instalment plan, with high interest charges. The title remains in the seller until the last instalment has been paid, even though the buyer has possession. Obviously, this opens the door for fraud, if the possessor is to be free to appear to own the goods while not in reality able to convey a good title to anyone whom he in turn could induce to buy. Accordingly all the provinces except Manitoba and Quebec have passed laws requiring the registration of such conditional sales with the County Court Clerk or Registrar of Deeds or Prothonotary, etc. If the sale is not registered, and the buyer subsequently sells or mortgages the article to a third party, who acts in good faith, the original seller cannot, as he otherwise could, recover the article. (See later, under Negotiable Instruments, as to Lien Notes, given in such transactions.)

Chattel Mortgage. The chattel mortgage, which is not found in Quebec, is simply another form of conditional sale. It deals, not with real property, but with personal property, "goods and chattels." It is practically a deed of certain property or chattels as security for borrowed money, for example, with the proviso that when the debt is paid or other obligation met the mortgage is to become null and void. It differs from the ordinary conditional sale in that the title passes to the purchaser at once. To hold the goods against judgment creditors, or subsequent purchasers or mortgagees in good faith, it is necessary to register the mortgage and the affidavit of a witness with the specified legal authority.

If before the mortgage is due the mortgagor attempts to sell any of the goods, or to move out of the Registration district, or defaults in payment, the mortgagee may take possession. If the mortgage is not paid at maturity, the mortgagee may take possession of the goods and remove and sell them, returning to the mortgagor any surplus; or he may leave the goods in the mortgagor's hands and extend the time of payment, filing a renewal statement. When the mortgage is paid, a discharge should be filed at the same office.

Warranties.

A warranty is a contract or promise made by a seller of goods in favor of the buyer, guaranteeing to stand damages if certain conditions as to quality, amount, title, etc., are not found to be fulfilled. It is, strictly speaking, not a part of the contract, nor a condition which if broken will break the contract, but a collateral bargain.

An express warranty is an affirmation by the seller of a material fact concerning the goods, e.g., a statement that the colors in a piece of cloth are fast and will not run. General warranties of "soundness" will not usually cover specific defects obvious to the buyer, but they will cover defects about which a buyer expresses doubt after examination. Expressions of opinion or "puffs" do not amount to warranties.

An implied warranty is one not expressly stated, but gathered from circumstances, from custom or usage, as when one sells goods by sample there is an implied warranty that the

goods will correspond with the sample, and a warranty also that the vendor has the title in the goods and can pass it on. The seller of goods implies he has title and authority to sell; if the goods are sold by description or by sample he impliedly warrants that the goods will correspond to the description or sample. If the buyer makes known to the seller that he wants the goods for a particular purpose, and asks the seller to supply goods fit for that purpose, an implied warranty arises on the part of the seller that the goods he chooses will meet these requirements. Where, however, the buyer has an opportunity to judge for himself, he cannot complain if defects in quality or lack of suitability develop. Whatever a wide-awake, informed and cautious man could have discovered about the quality of the goods, each buyer is supposed to discover: caveat emptor.

"Caveat emptor," declared Fitzgibbon, L.J., in an Irish Court of Appeal case, "does not mean in law or in Latin that the buyer must 'take chance'; it means that he must 'take care.' It applies to the purchase of specific things, e.g., to a horse or a picture, upon which the buyer can, and usually does, exercise his own judgment. It applies also whenever the buyer voluntarily chooses what he buys. It applies also where by usage or otherwise it is a term of the contract, express or implied, that the buyer shall not rely on the skill or judgment of the seller. But it has no application to any case in which the seller has undertaken, and the buyer has left it to the seller, to supply goods to be used for a purpose known to both parties at the time of the sale."

A buyer to whom title has passed cannot rescind the sale for breach of an express warranty; he can merely claim damages. If title has not passed to him, he may refuse to receive the goods upon discovering a breach of the warranty. Of course, if it could be shown that the seller knew that the defect existed, while making the warranty, this is fraud, and the whole contract may be voided. In case of breach of an implied warranty, the buyer may, as he chooses, either reject the goods and recover what he has paid, or keep them and sue for damages, or in case the price is not paid, deduct the amount of damages from the price.

Rights and Remedies.

Rights of Unpaid Seller. The parties may not fulfil their agreement and the question then arises as to their respective rights. In the first place, the buyer may refuse to accept the goods he ordered, or after accepting them, he may refuse to pay the purchase price. What are the remedies of the seller?

If the goods and title are still both in the seller's hands, he has a choice of remedies. He may resell the goods, or may hold them for the buyer and sue for the purchase price, or may keep the goods and sue for damages, the difference between the contract price and what they could be sold for elsewhere.

If both title and possession have passed to the buyer, the only course is to bring an action for their price or their market value.

If the title has passed to the buyer, but the seller still retains the goods in his possession, he has the right to a lien, to retain possession until payment is made. A merchant's right of lien extends only to the particular goods that are not paid for; he cannot retain other goods that have been paid for as security against the new debt. Stoppage in transitu is an extension of the right of lien. If after goods have been delivered to a common carrier the seller learns that the buyer has become insolvent, he has the privilege of ordering a stoppage in transitu, notifying the carrier to hold the goods subject to future orders. If this privilege were exercised against a buyer found to be solvent, the latter could not only demand the goods, but bring an action for damages against the seller.

Rights of Buyer. The buyer, in his turn, has the right to demand possession of the goods. If they are not forthcoming and title has already passed to him, he may replevin the goods, thus getting actual possession, or sue in tort for conversion, thus getting their value in money. If, however, title has not passed to him, he may simply bring an action for damages, and the amount of damages awardable will be the difference between the price in the contract and the price

which the buyer will now have to pay to secure similar goods; there may also be ground for special damages if it was known to the seller that the goods were needed for a special purpose, now unattainable.

Examples:

Breckenridge v. McAfee: B. brings suit for the value of wheat which his hired man stole and sold to M. Held, that a thief acquires no title to stolen property, and can give none to a buyer, and that such a buyer is liable to the owner of the goods for their value without regard to his innocence or good faith in making the purchase.

Farquharson v. King: A, a timber merchant, instructs the dock company where his timber is stored, to accept delivery orders signed by his clerk; the clerk, under an assumed name, sells some of the timber to B, who knows nothing of the fraud, or even of A's existence; the clerk carries out the fraud by giving, in his real name, the dock company delivery orders for himself under his assumed name, and then in the latter name giving delivery orders to B. Held, that A can recover the value of the timber from B.

Dinsmore v. Barker: Horner, falsely claiming to be an agent of Barker and Co., came to Dinsmore, bought his wool for Barker and Co., giving a memorandum on a business card of theirs, and ordering shipment to Barker; the wool was shipped as directed, but was delivered by the carrier to Horner, who in turn sold it to Barker as his own; later, Dinsmore claims from Barker the amount due, and on being refused, brings an action to recover the goods. It is held that Dinsmore sold to Barker, if anyone, not to Horner as Horner had no authority to act for Barker, and Barker refuses to ratify his unauthorized act, there was no sale by Dinsmore to anyone; that as Horner never had any title to the goods he could confer none on Barker, and therefore Dinsmore may recover the goods.

Terry v. Wheeler: Lumber in vendor's yard sold, pieces designated and price paid, but before vendor could, as agreed, deliver the lumber at the railway station, it was burned. Held, that this was an executed contract of sale, the title had passed and the loss fell on the buyer.

Anthony v Halstead: The following memorandum had been given: "Received from G. Anthony, Esq., £60 for a black horse, rising five years, quiet to ride and drive, and warranted sound up to this date, or subject to the examination of a veterinary surgeon." Held, to be a guaranty of soundness, and not that the horse was quiet to ride and drive.

Dean v. Morey: M. sold to D. a horse that was a cribber. Held, that he was not bound to disclose this fact to the plaintiff, as the

horse was subject to the inspection of the buyer, and an examination of the horse's mouth would at once have revealed the defect.

Varley v. Whipp: Whipp agrees to buy a second-hand reaper, which he has not seen, but which, he is assured by the seller, was used only one year to cut fifty acres; the machine is delivered, and W. finds it nearly worn out. Held, this is a sale by description, and if the machine does not correspond, the buyer can reject it.

Frost v. Aylesbury Dairy Co.: Frost buys milk for family use from defendant; milk account book supplied to plaintiff contains a statement of the precautions taken to keep the milk pure; the milk has typhoid germs, and plaintiff's wife is infected and dies. Held, a breach of warranty, and the milk dealer liable to damages.

Aitken v. Boullen: A quantity of maroon twill had been sold by sample; part of the twill supplied was inferior to the sample. Held, that the buyer may reject the whole, or may retain the whole, claiming damages for the part unequal to sample, but that he cannot keep the part equal to the sample and reject the other part.

Hayman v. McClintock: A, having 200 sacks of flour in a warehouse, sells 50 to B, is paid, and gives B a delivery order. B presents the delivery order at the warehouse and gets a storage warrant in exchange. Nothing is done to appropriate any particular 50 sacks to the contract. Held, that no property in any of the sacks passes to B, and if A becomes bankrupt his trustee can claim the whole of the flour.

Asworth v. Wells: An orchid, warranted a Cattelaya Alba, is bought at a sale for £20; two years afterwards it flowers, and proves to be a purple variety worth a few shillings, the white variety being worth £50. Held, that the buyer is entitled to damages (£50) for breach of warranty.

Mount v. Wolcott: Mount, a gardener, asks Wolcott, a seed merchant, for early strap-leaf, red-top turnip seed, explaining it was an early variety, much in demand in New York City, and that he was in the habit of raising it for the early New York market; Wolcott showed and sold what he said was such seed; it proved to be Red-Russian turnip, good only for cattle; Wolcott proved that he himself had bought the seed for strap-leaf, red-top turnip, and believed it to be such. Held, that there had been a breach of the implied warranty, and that Mount may recover as damages the difference between the market value of the crop he did raise and the market value of the crop he might have raised.

Questions for Review.

1. Define sale. What is the distinction between personal and real property? Distinguish between sale, barter and bailment, and between sales and agreements to sell.

2. Who can be parties to a sale? Can a thief give good title to the property stolen, under any circumstance? What are the powers of factors or commission agents in effecting a sale?

3. What are the provisions of the Statute of Frauds or similar acts as to sales of goods? What must be included in the written note or memorandum?

4. What is the importance of the question, when does title pass? What is the rule in the case of ascertained goods? unascertained goods?

5. What are conditional sales? When does title pass in case of sale on trial? in case of sale on the instalment plan? What is done to prevent fraud in the latter case?

6. What is a chattel mortgage? Why consider it under the head of Sales? What are the rights of the mortgagee?

7. What is a warranty, in a contract of sale? Distinguish between express and implied warranties. Give instances of each. What is the rule of caveat emptor? What are the rights of the buyer in case of breach of express warranty? implied warranty?

8. What are rights of an unpaid seller, if title has passed? if it has not passed? What are the rights of the buyer, if title has, and if it has not, passed?

Questions for Written Answer.

1. Answer one of the above review questions.

2. To what extent are instalment sales customary in your neighborhood? chattel mortgages? Comment on any results you may have observed.

3. What do you think would be the ruling in the following circumstances:

(a) Chapman sells 1,000 bushels of wheat to Sawyer for $1.00 a bushel, agreeing to pay on the first day of next month. The wheat is ready sacked for Sawyer to get when he calls for it. On the first of the month Sawyer tenders payment, but wheat having risen to $1.25, Chapman refuses to deliver. Can Sawyer enforce delivery?

(b) Mrs. Williams buys $150 worth of dress goods in a store, on credit, taking home with her one purchase, a spool of thread. Later, she refuses to accept the goods when delivered, pleading the Statute of Frauds.

(c) Perkins consigns goods to Healy, who fails before receiving them. Perkins stops them in transit, and Healy's other creditors attach them at the station. Who is entitled to the goods?

(d) Turner loses a diamond ring, which Aitken finds and sells to Rose, an innocent purchaser. Turner discovers that Rose has the ring and proves his property. What result?

LESSON IV.

Bailment

The law of bailments covers another important branch of business relations. It has to do with the rights, duties and obligations of parties when one has the personal property of the other in his keeping. A bailment is defined as a transfer of personal property for some specific purpose, with the understanding that at the end of the time or purpose specified the property is to be returned to its owner or some person designated by him. The person who owns the property is the **bailor;** the one in whose possession it is the **bailee.** Usually the transfer takes place by bargain and delivery (Old French **bailler,** to deliver), but by a legal fiction cases of found or stolen property are considered bailments, the finder or the thief being held bailees for the owner.

Examples: A hires a horse from a livery-keeper, B; this is a bailment. A is the bailee and B the bailor. X leaves a trunk in a room in an hotel where he is registered; this also is a bailment. P. gives a package to an express company to deliver in another town; this is a bailment. F leaves his bicycle in a repair shop to be repaired; this is a bailment. R deposits $10,000 worth of bonds as collateral security for a loan from a bank; this is a bailment.

A bailment differs from a sale in that in a sale there is a change of ownership, a transfer of title, whereas in a bailment the general ownership remains in the bailor. It differs from a barter in the same way, and also in that in a bailment the identical thing must be returned, though sometimes in an altered form, while in a barter something quite different is to be returned. The distinction is often important as determining upon whom a loss falls; if a farmer takes wheat to a mill to be ground and the flour returned, this is a bailment, and if a fire destroys it the loss is the farmer's; if, however, the farmer took the wheat to the mill agreeing to receive in return flour ground from other wheat, this is a sale, and the loss of the wheat would fall on the miller.

While the article is in the bailee's possession, he may take slight, ordinary or extraordinary care of it. Ordinary care would be defined as the care which an ordinarily prudent per-

son would take of his own property. Slight care is that degree of care which even a careless man takes of his own goods, while great or extraordinary care is that degree of care which a man of great diligence and prudence takes of his goods. Different degrees of care are required of the bailee. Obviously he can be expected to exercise greater care if he has borrowed a horse for his own use than if the owner for his own convenience has left it with him to keep.

Bailments are classified as gratuitous and non-gratuitous, according as a charge is made for the service or not. A further division may be made as follows:

1. Bailment for the benefit of the bailor: deposit and commission.

2. Bailment for the benefit of the bailee: loan for use.

3. Bailment for the benefit of both bailor and bailee: pledge and hiring, including exceptional bailments, as with innkeepers and common carriers.

Bailment for the Benefit of the Bailor.

This is the simplest as well as the oldest kind of bailment. It means depositing goods with a friend or neighbor gratuitously and as a favor. Two of the old terms of Roman law are still used in connection with such action, for the whole law of bailment was very largely taken over from Roman law: when the article is left with the bailee merely for safekeeping, it is a case of deposit, while the bailment of an article upon which some work is to be done gratuitously is a mandate or commission.

The bailee is not obliged to receive the property, but when he does so he must carry out the obligations involved. He must return it when demanded, with any increase or accumulation that has taken place. If he has undergone any expense necessary and incident to its safekeeping, he is entitled to recompense. He is not entitled to make any use of the property, except such as is necessary for its welfare, as exercising a horse or milking a cow. As the bailee is acting gratuitously, he is required to exercise only slight care; if this degree of care is not exercised, he will be liable for any damages suffered. What slight care would be, would vary with the article

and the district or circumstances: more care would be required in keeping a diamond than a plough. The court instructs the jury that a gratuitous bailee is required to give slight care, is liable only for gross negligence, and it is then for the jury to decide whether the bailee actually exercised this measure of care or displayed gross negligence.

Bailment for the Benefit of the Bailee.

This also is an outcome of personal friendship rather than of business relations. When a man gratuitously lends a horse to a friend for a day's drive or lends him a lawn-mower to mow his lawn, the loan is a bailment for the sole benefit of the bailee, or borrower. The bailee must return the property at the end of the time agreed. He is entitled to make the use contemplated at the outset. He must meet all ordinary expenses involved: for example, to feed and shelter a horse borrowed, though probably not to pay a veterinary for services required. Since the bailment is entirely for the borrower's or bailee's benefit, he must exercise the highest degree of care and diligence, such care as a man of more than ordinary prudence would use under like circumstances, and is liable for any loss suffered even by slight negligence.

Bailment for Mutual Benefit.

This is a business transaction, rather than, as in the former cases, an act of favor or friendship, and is the most important class of bailments. Compensation is paid by the bailor for the services received from the use of the property. He obtains the use of the property, the bailee has the compensation paid.

Pledge or Pawn. This class of mutual benefit bailments comprises the loan or deposit of a property or title to property as security for a debt or agreement. It is the class in which the banker is most directly concerned. We may first note generally the rules as to pledge in general, and then the rules governing banks in relation to collateral security.

A pledge or pawn, then, is a deposit of a chattel as security for a debt, and is usually accompanied by power to sell the chattel if the debt is not paid. Delivery of the article itself or

of documents of title is necessary to constitute a bailment. The most common instance is the pledging of an article with a pawnbroker, or person who makes a business, usually under strict legal restrictions, of lending money on the security of personal property. Since both parties are benefited, the bailee is responsible only for ordinary care while the property is in his possession. The burden of proving lack of care is on the bailor. Any profits derived from the property must be applied on the debt or accounted for to the bailor, and any expenses incurred may be charged. The bailee must return the article when the debt is paid.

If the debt is not paid when due, the pledgee may sell the article, after giving due notice of sale, and demanding payment. The sale must be by public auction, unless the pledgee is a pawnbroker, who is entitled to sell privately. When large values are concerned, the pledgee may ask a court for a decree of foreclosure. If the sale yields more than the amount of the debt, the balance must be returned; if less, the difference may be sued for.

Collateral Security. Collateral security means any property assigned or pledged in addition to (literally, laid side by side with) a personal obligation, to secure its performance. Sections 76-78 of the Bank Act read, in part, as follows:

> The bank may deal in, discount and lend money and make advances upon the security of, and take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign, and other public securities;
>
> Except as authorized by this Act, the bank shall not, either directly or indirectly, (a) deal in the buying or selling, or bartering of goods, wares and merchandise, or engage or be engaged in any trade or business whatsoever; (b) purchase, or deal in, or lend money, or make advances upon the security or pledge of any share of its own capital stock, or of the capital stock of any bank; or (c) lend money or make advances upon the security, mortgage or hypothecation of any lands, tenements or immovable property, or of any ships or other vessels, or upon the security of any goods, wares and merchandise.

["Except as authorized by this Act" includes the power specifically given to banks in this section and also in Sections 77-89, including power to acquire real estate for their own use and occupation, to take mortgages as additional security for debts contracted to the bank in the course of its business, and to lend on warehouse receipts, etc.]

The stocks, bonds, debentures or securities, acquired and held by the bank as collateral security, may, in case of default in the payment of the debt, for the securing of which they were so acquired and held, be dealt with, sold and conveyed, either in like manner and subject to the same restrictions as are herein provided in respect of stock of the bank on which it has acquired a lien under this Act, or in like manner as and subject to the restrictions under which a private individual might in like circumstances deal with, sell and convey the same: Provided that the bank sall not be obliged to sell within twelve months.

The right so to deal with and dispose of such stock, bonds, debentures or securities in manner aforesaid may be waived or varied by any agreement between the bank and the owner of the stock, bonds, debentures or securities.

Before 1913 the agreement referred to in the last section quoted must have been made at the time the debt was incurred or extended, but in the revision of the Bank Act in that year this restricting clause was struck out, so that now such arrangement may be made at any time, when the loan is granted, during its currency, or after maturity. In the forms adopted by the various banks for the hypothecation of securities, it is usual to take power to realize upon the securities in any way deemed advisable without notice, in case of default. The borrower may agree to maintain a certain margin of safety. Stock certificates should be accompanied by a power to transfer the title upon the books of the corporation issuing them. The bank takes power to grant extensions, accept compositions, grant releases and discharges, and otherwise deal with the customer and with other parties and securities as it sees fit. It may of course sue upon paper taken as collateral security when it falls due before the debt secured by this paper itself matures.

Warehouse Receipts and Assignments. In the section just quoted from the Bank Act it will be noted that a bank is forbidden to lend upon the security of any goods, wares and

merchandise. The extensive powers conveyed to the banks by sections 86-90, giving permission to acquire warehouse receipts and bills of lading as collateral security for a debt and to lend money to wholesale dealers, manufacturers and farmers upon assignment of certain goods and products, are exceptions to this general rule. These provisions developed gradually as the result of experience and much tentative legislation (see article by Z. A. Lash, K.C., Warehouse Receipts, in 2 Journal Can. Bankers' Association, p. 54). In the earliest measure, passed in 1859, it was provided that any bill of lading or receipt given by a warehouseman, miller, wharfinger, master of a vessel or carrier, for goods stored, might by endorsement be transferred to any chartered bank as collateral security for a bill of exchange or note and should vest the title of such goods in the bank, subject to right of transfer if the bill was paid when due. The courts held that the person giving the bill of lading or warehouse receipt must be a bailee, not an owner. Two years later, however, the Act was amended to permit anyone engaged in the calling of warehouseman, miller, wharfinger, master of a vessel or carrier, to give a receipt for goods owned by himself as security for a loan. Gradually the list of persons entitled to borrow money in this way, practically giving the bank a mortgage on their own goods in the form of a warehouse receipt, was extended to include, besides the above, cove keepers, wool dealers, meat packers, saw millers, tanners, distillers, cotton manufacturers, etc. It came to be felt that this fiction that a man had received in store from himself certain goods and had issued a warehouse receipt for them was absurd, and that it was equally absurd to limit the list to the dealers or manufacturers specified. Accordingly in the revision of 1890 it was provided that only bailees and not owners could give warehouse receipts, and at the same time the current practice of lending to owners was regularized and widened by inserting the familiar provisions for lending to all engaged in manufacture or wholesale trade upon the security of their products.

Every bank issues definite instructions as to practice in connection with these sections: the following summary, from

the articles above referred to by Mr. Lash, may however be useful for its conciseness:

To summarize what should be borne in mind whenever a bank is asked to advance money upon the security of a warehouse receipt:

1. It can be acquired only as collateral security for the payment of a debt incurred in its favor in the course of its banking business.

2. The receipt must be given by a person for goods in his actual, visible and continued possession as bailee thereof in good faith, and not as of his own property.

3. A note taken by way of renewal or substitution or otherwise, representing in substance, though not in form, a pre-existing indebtedness, is not negotiated within the meaning of the statute.

4. A warehouse receipt cannot be taken in substitution for one previously given.

5. If the receipt be not given at the time the bill or debt is negotiated, it cannot be given afterwards unless there be at that time a written promise or agreement to give it .

To summarize what should be borne in mind when a bank is asked to advance money upon the security of an assignment of goods under section 88:

1. The borrower must be a wholesale manufacturer, etc. In deciding the question who comes under this definition, give the benefit of the doubt to the bank and refuse the advance.

2. Follow closely Form C in the schedule to the Act.

3. Remember that the description of the goods must be a particular description, and that the place where they are must be mentioned.

4. The money must be advanced at the time the security is taken, or upon the written promise that it will be taken.

5. No change in the form of a pre-existing indebtedness, such as discounting a note and using the proceeds to pay off such indebtedness, will be regarded as an advance for which security in form "C" can be taken.

6. A security in form "C" cannot be taken in substitution for one previously given.

The goods for which a warehouse receipt is given must be in the actual possession of the bailee, and the premises where they are stored must bona fide be his, but it is not essential that they be premises kept primarily for warehousing goods of this or other kinds.

It is not essential that the borrower should be the owner or holder of the warehouse receipt. It may be given to the bank by a third person as security for the borrower, or may be issued to a third person to be endorsed by him over to the bank.

The bank, as owner of the goods, must be named as such in an insurance policy subject to a condition that the insurance must be in the owner's name.

The bank may return a bill of lading to the pledger for a special purpose, as, for example, to sell the goods for the satisfaction of the debt, without losing its rights under the contract.

The Dominion Parliament, in virtue of the power conferred upon it by the British North America Act to legislate on "Banking, incorporation of banks and the issue of paper money," may validly legislate upon such matters as those involved in these sections, even though such laws modify and conflict with provisions as to warehouse receipts which the provinces had passed in virtue of their power to legislate on "Property and Civil Rights in the province." So, too, provincial statutes providing that a bill of sale or chattel mortgage, if not duly registered (see above, under Sales), shall be void as against creditors of the grantors or mortgagors, are overridden by the provision that a bank's lien under this section takes precedence even of the claim of an unpaid vendor, unless he himself had a lien on the goods to the bank's knowledge. So prevalent is the custom of the banks lending to large manufacturers or wholesalers upon assignment that it is to be presumed that such relations exist, and even though not formally notified by registration there is much to be said for the assertion that private lenders are not in practice likely to be deceived by the lack of the formality.

Upon default in payment of the debt, the goods may be

sold by public auction, after due notice, thirty days in advance in the case of forest products and ten days in the case of other goods. The owner may waive the necessity of notice and public sale, authorizing the bank to sell the goods by private sale, and apply any balance as agreed upon. The bank should not sell much more of the goods than necessary to realize its debt.

Bailment of Hire—(a) Hiring of Use. To return to the general discussion. The bailee may hire an article from the bailor, a horse from a livery stable or a rowboat from a boat livery. The bailor must deliver the article as agreed and allow the bailee or hirer to retain it for the stipulated time or purpose. The bailee or hirer must use the property with ordinary care, and for the purpose agreed. He is not liable for inevitable accidents or for damage done wilfully by a third person; he is liable only for negilgence, for want of ordinary care. If by his negligence damage is done to a third part, in the use of the chattel, he and not the bailor must pay. An intentional and material departure from the terms of the contract may amount to conversion and render the hirer absolutely liable for anything that may happen to the chattel.

(b) Hired Service about a Chattel. In such cases the bailor engages the bailee to keep, repair, or transport the article in question, as when you engage a warehouseman to store your household furniture, or leave your watch with a jeweler to be repaired, or hand a letter to the postal authorities for delivery. The bailee is bound to use ordinary care and diligence, and is liable for ordinary negligence. What is negligence will vary with the property and circumstances; a greater degree of care is required in the case of a depositary of watches and jewelry than of an ordinary warehouseman. When the bailee is to do some work upon the chattel, he must use ordinary skill to avoid doing damage, just as he must use ordinary diligence to prevent it being stolen or destroyed by others. The bailee must return the chattel on demand or at the end of a specified time, provided he is paid the compensation agreed upon, but if not paid, he has a lien on the chattel for his reasonable charges and may sell it to meet these charges.

Innkeepers. Innkeepers and common carriers both perform services of the kind last mentioned, but because of the extraordinary care and diligence required of the bailee, they are classified separately.

An innkeeper or hotelkeeper is one who holds himself out to the public as ready to entertain travellers or transients as guests, furnishing lodging or food and lodging. A lodging house or apartment house is not an inn, because the keeper is not bound to entertain all who apply, and a restaurant is not an inn for the same reason and also because providing food only and not lodging. A sleeping-car, it has been held, is not an inn. A guest is a transient who makes a contract, express or implied, with the innkeeper for accommodation; he may be either a traveler or a resident of the place where the inn is situated. The taking of lodgings is not necessary to constitute him a guest; he may be a guest simply through taking a single meal. One who lives permanently at an hotel is not a guest in the legal sense, nor is one who is receiving gratuitous accommodation from the innkeeper.

An innkeeper is bound to receive to the limits of capacity all who offer themselves for entertainment, unless disorderly or suffering from disease or unable to pay in advance. A refusal to receive any fit and orderly person is ground for an action for damages. The innkeeper must receive the baggage of the traveller as well. At common law the responsibility of the innkeeper as bailee was exceptionally great. He was absolutely liable for the loss of his guests' goods while in his inn, unless due to the fault of the guest or to an act of God, and was thus practically an insurer of the goods. This special duty originated in early times when highwaymen were frequent and collusion between the robber and the innkeeper was also frequent. The innkeeper is liable for the acts of his servants, as well as for his own. In recent years, however, this extreme common law liability has been modified by statutes which permit the innkeeper to limit his responsibility for money and valuables by posting in a conspicuous place (usually in each guest's room) a notice that he will not be responsible for such property unless delivered to him for custody in his safe. The liability of the innkeeper exists so long as the owner of the

property remains his guest. In turn, he is given a lien for any unpaid charges, upon the property brought into the house and in his custody.

Common Carriers. A common carrier is one who undertakes, for hire, or reward, to transport the goods of such as choose to employ him, from place to place, as, for example, a railway or steamship or express company. A private carrier is one who carries for a limited number of persons, by special agreement.

In Canada the rights and duties of railways have been regulated in detail by the Railway Act, while the Board of Railway Commissioners are empowered to interpret many matters of detail.

Common carriers, like innkeepers, must not exercise personal discrimination. They must carry for all indifferently who apply, up to capacity, and, in the case of railways, which enjoy special privileges, in Canada, be required to increase the capacity provided, if inadequate. They may, however, refuse dangerous goods, or may openly limit themselves to the carriage of certain goods and refuse all others. They must convey the goods without unnecessary delay or deviation—somewhat vague expressions.

Their liability for the goods carried is unusually great: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner. If they should be lost or injured by the gross negligence of the carrier or his servants, or stolen by them, the owner would be unable to prove either cause of the loss. His witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their master and themselves. Therefore, to give due security to property, the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward, the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well-known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely, an act of God and an act of the King's enemies."

The company may insist upon freight being properly packed or crated. In case goods are shipped under a lower classification than that which they should bear, the carrier may be relieved from damages. If delay in delivery is due to causes beyond the carrier's control, such as heavy snowstorms, and the company shows that it acted as quickly as possible, it will be relieved of responsbiility. If the company takes the goods by other than the customary route, and damage is suffered by this delay, the carrier will likely be held liable. If reasonable diligence and precautions are used, the carrier is not responsible for damage by decay of perishable fruits or evaporation of liquids. Proper accommodation must be provided for live stock, including yards and water facilities.

The carrier may reduce his liability by special contracts with the shippers. The bill of lading, or contract given to the shipper by the carrier, both a receipt and a contract, usually includes such a special contract. In this contract a railway company, for example, may contract that it shall not be liable as an insurer of the goods forwarded, and may limit the amount that can be recovered for losses due to its negligence; it cannot, however, stipulate for total exemption from the results of its negligence. When a shipper, who is able to read, or who, it is proved, had these conditions explained to hmi, signs such a bill of lading or other document, it will be presumed that he knew of and accepted the conditions.

The risk and liability begin when the freight has been accepted and delivered to the carrier; they end when the carrier delivers it to the consignee or his authorized agent. If the carrier delivers to the wrong person, even though deceived by a forged order, he is liable. On delivery, he should demand the bill of lading forwarded by the shipper to the consignee. When carriage is by water, delivery on the customary wharf is sufficient, and when by rail, carrying to a siding or freight house. If, when the carrier has notified the consignee that the goods have arrived, the latter refuses or neglects to take delivery, the carirer's special liability as such ceases, and he now assumes the smaller degree of liability attaching to a warehouseman.

When more than one carrier conveys the goods, ordinarily the contract between the shipper and the first carrier provides that the latter is to be liable only for damage suffered on its own line. So far as railways under the authority of the Dominion Railway Commission are concerned, however, it is provided that when the shipment is from one point in Canada to another such point, or when the goods are shipped under a joint tariff (an arrangement between two or more companies as to rates and shares), the carrier which issues the original bill of lading is responsible for damages occurring anywhere on the route. Later the first carrier may recover from the carrier really responsible.

Carriers of Passengers. Public carriers of passengers must, to the limit of capacity, carry all persons who apply for passage and are prepared to pay, unless drunk or disorderly, or afflicted with a contagious disease. Except in the province of Quebec, employees of a company are not considered passengers. A public carrier does not insure the safety of passengers as he does the safety of goods(against harm from all causes (with the above exceptions), but he is responsible for damages due to his own negligence, and a very slight degree of negligence is sufficient to establish liability. A person travelling on a free pass, on which it is stipulated that the company will not be liable even in case of negligence, cannot recover in case of accident. Nor can a tramp riding blind baggage. Mail clerks or contractors' workmen or others carried free by arrangement with the company may, however, recover, and so, in Quebc, may employees on a train injured by an accident.

A common carrier usually agrees to carry free a stipulated amount of personal baggage. For the loss of this baggage, if checked or otherwise delivered to the company, the carrier will be liable, though it is permissible and customary to limit the amount of the liability by agreement printed on the ticket. Goods other than personal baggage so checked could not be recovered. Where, however, a passenger carries his own hand baggage with him into a railway car or boat, and it disappears, the carrier is not liable unless the loss can be proved to be due to the neglect or misconduct of the employees.

Bailment.

EXAMPLES.

Hagebush v. Ragland: R. borrowed a horse from H. to drive, and so injured the horse that it died upon being returned. Held, defendant liable; when an animal is borrowed without hire, the borrower is bound to take extraordinary care of it.

Jones v. Morgan: J. stored household goods in a room of a warehouse owned by M., and rented for storage purposes; most of the goods were stolen by the employees in charge. Held, that the defendant was a bailee for hire and bound to exercise ordinary care, which had not been shown.

Pullman Palace Car. Co. v. Smith: Smith purchased a ticket on the Palace Car Company's sleeping-car, and while asleep in the car was robbed of his money, left under his pillow. Held, the company were not liable as innkeepers.

First National Bank v. Ocean National Bank: Plaintiff deposited bonds in vaults of defendant's bank for safe-keeping, no charge being made; the defendant bank was attacked by burglars and the bonds stolen. Held, that a gratuitous bailee is liable only for gross negligence, and is not bound to take any extraordinary measures for security.

Fisher v. Kyle: Kyle hired a horse from plaintiff to drive to a certain town, but drove beyond it, and the horse fell dead while being driven. Held, the defendant was liable for the value of the horse, having taken upon himself all the possible consequences by driving beyond the place agreed.

Ontario Bank v. O'Reilly, 1906: A storage and warehouse firm consisted of A and B, and a commission and produce firm of A, B and C. The commission firm bought goods and stored them with the firm of A and B, A issuing receipts to C, who endorsed them to the bank as security for notes discounted. Held, that A in signing such receipts was not in any sense giving receipts "as of his own property," the two firms being distinct.

Banque Nationale v. Royer, 1910: A firm of wholesale grocers put part of their stock in control of a clerk in their employment, putting the goods in premises which they leased to him at a nominal figure; held, by a majority of the court, that the clerk was a bailee in actual, visible and continued possession of the goods, and that a warehouse receipt for goods so stored conferred on the bank the rights mentioned in Sect. 86 of the Bank Act.

Ballentine v. North Missouri Railroad Co.: Held, that a snowstorm which blocks up a railroad and delays the running of the trains is an act of God, for which the carrier cannot be held liable.

Vail v. Pacific Railroad: Fruit trees shipped on defendant road were frozen en route; held, freezing was an act of God for which the company was not liable, unless caused by unnecessary delays or by careless exposure of the trees.

Parker v. Flagg: Held, that unless a carrier limits his responsibility by the terms of a bill of lading or otherwise, he cannot escape the obligation to deliver the goods at their destination unless prevented by the public enemy or an act of God; a fire is not an act of God unless caused by lightning.

Demming v. Grand Trunk Ry. Co.: "Where the carrier contracts to carry goods within a specified time, an unexpected rush of freight will not excuse delay in transporting it."

Helliwell v. Grand Trunk Ry. Co.: "Where the delay in transportation of goods is due to a sudden and unusual press of business, the carrier is not liable for such delay in the absence of a special contract requiring delivery at a certain time."

James v. Dominion Express Co.: "Where a contract for the shipment of goods contains a stipulation that the property shall be shipped by a certain route, or in a certain way—by express—and the initial carrier unnecessarily deviates from that route or ships the goods by freight, it is liable for all losses which occur either on its own line or on its connecting lines, on account of or during the course of the deviation."

Lawrence v. Howard: "In this country hotel-keepers act in a double capacity, being both innkeepers and boarding-house keepers. As innkeepers they entertain travellers and transient persons; as boarding-house keepers, they entertain residents, regular boarders, and lodgers for definite lengths of time, and at specific rates previously agreed upon. A guest is a traveller or wayfarer who comes to a hotel for transient accommodation; a boarder is one who comes to an inn or hotel under a special contract to board and sojourn there, and who, for the time being, makes it his home. A person living at an hotel as a regular boarder by the month is in no sense a guest so as to hold the proprietors liable as innkeepers; in such a case they are liable only as boarding-house keepers, and are held to ordinary diligence only."

Sise v. Pullman Palace Car Co. (Quebec): Plaintiff entrusted valise to a Pullman porter; it was stolen from the car while he

was on the platform waiting for the train to go. Held, in the Superior Court, that the Pullman Company was responsible as coming under the category of persons having lodgers, hotel-keepers and boarding-house keepers. Court of Appeal did not pass upon question whether Pullman Company was in this category, but held that fact of an employee of the company putting the valise in a compartment of the car without locking the door was a sufficient act of negligence to make the company responsible even as ordinary depositories.

Greene v. Windsor Hotel Co. (Quebec): Plaintiff spent winter with family at Windsor Hotel; when leaving in May he found a trunk brought at first-coming and a portmanteau brought at Christmas was missing; defendant contended that these were not part of a "traveller's" baggage: "There is no doubt that the difference between the mere traveller and the boarder or lodger exists in English law. Is this our law? The 'Code as amended by provincial law' seems to me to put the responsibility and liability of boarding-house keepers on the same footing as hotel-keepers, and the same liability exists in favor of their guests or boarders that exists in favor of the traveller in a hotel as regards baggage, the proof of the loss, and the care of it. . . I hold that these statutory amendments do reform and change our law so that the boarding-house keeper is placed on the same footing as regards rights and as regards liability, as the hotel-keeper for the baggage of guest or boarders."

Dansey v. Richardson: Lord Campbell, C. J.: "Such due and reasonable care as a boarding-house keeper ought to take of the goods of a guest by no means amounts to the care which an innkeeper is bound to take of the goods of a guest or the care required of a bailee with whom goods are deposited, to be safely kept and returned to the owner. Low as the duty of a boarding-house keeper may be, I cannot go so far as to say in no case can he be liable for loss of goods by the negligence of a servant. The general rule is, that the master is answerable for the negligence of his servants while engaged in offices which he employs them to do and I am not aware how the keeper of a lodging-house should be an exception to this rule."

Howell v. Jackson: "Where a man comes into a public house and conducts himself in a disorderly manner and the landlord requests him to go out and he will not, the landlord may put him out, even though the disturbance does not amount to a breach of the peace. To do this the landlord may lay hands on him, and in so doing he is not guilty of any breach of the peace."

Questions for Review.

1. What is a bailment? Who is the bailor? the bailee? Give examples. Distinguish from a sale, barter.

2. What degrees of care may be required of a bailee? How may bailments be classified?

3. What is bailment for the benefit of the bailor? Give instances. What are the liabilities of the bailee in this case?

4. What is bailment for the benefit of the bailee? What are the liabilities of the bailee in this case?

5. What is bailment for mutual benefit? Define pledge. What are the rights and obligations of the pledgee?

6. Define collateral security. What are the main provisions of the Bank Act on this subject? In the case of your bank, what requirements are included in the hypothecating form?

7. What are warehouse receipts? Show their importance in Canadian banking. How did the present provisions as to assignment of manufacturers' and wholesalers' goods originate? What changes were made in the 1913 revision?

8. What conflict of jurisdiction is there between the Dominion and the provinces on this matter? What constitutes a warehouse? What degree of detailed description is required? What is done if the debt is not met at maturity?

9. What is hiring for use? What are the obligations of the hirer? What are the obligations of the bailee in case of hired service about a chattel? Illustrate.

10. Who is an innkeeper? A guest? What are the common law obligations of innkeepers as to guests and their belongings? What changes have bene made by statute in your province?

11. Define a common carrier. How are the rights and duties of railways regulated in Canada? Why is their liability for goods carried made great? What exceptions are there to this liability? May it be reduced by special contract? When does the liability begin? end?

12. What are the obligations of common carriers as to passengers? as to their baggage?

Questions for Written Answer.

1. Answer one of the above Review questions.

2. A bank agreed to keep in its vault, without recompense, a security box belonging to one of its customers. Safe blowers stole this box along with money belonging to the bank. Is the bank liable to its customer for the value of the securities?

3. Wilson hires a horse and carriage from a livery-keeper. The horse takes sick while Wilson is driving, and Wilson leaves it with a veterinary surgeon in another town for treatment. The veterinary sues the livery-keeper for care and keep. Result?

4. A Toronto hotel-keeper, having vacant rooms, refuses to give a traveller accommodation because he is a negro. The traveller sues. Result?

5. Goods are carried by the Canadian Pacific consigned to H. White, Ottawa. The freight reaches Ottawa and is placed in the station warehouse; notice is sent White, reaching him next morning. Before morning the warehouse and freight are burned. Whose loss?

6. Thompson, a passenger on the Grand Trunk, checks his trunk, containing his own ordinary changes of clothes, a dress for his wife, purchased on the trip, presents for some friends, and a purse containing $40, to be used on the journey. The trunk is lost. For what is the company liable if no special contract is made? For what if the baggage check contained a notice that liability was limited to $50?

LESSON V.

Insurance

An increasingly important part of contract is insurance. Insurance is in brief a device for distributing the risk of loss from different contingencies over a large number of persons, to prevent the persons upon whom the blow actually falls being crushed by it. The range of contingencies against which insurance is sought is constantly widening; life, marine, fire, casualty, guaranty and fidelity insurance are all familiar, and of late years a striking feature of social policy has been the extension, sometimes in a compulsory and nation-wide form, of insurance to cover loss from unemployment, sickness or invalidity.

Insurance is defined as a contract whereby for a stipulated consideration one party agrees to compensate the other for loss from a specified peril. The insurer who guarantees to compensate the other party is merely a middleman, attempting to bring together as many people as possible exposed to the same risk and thus widen the area over which a single shock is distributed. Though a dealer in risk, the insurer is not necessarily in a risky business; so far as any individual is concerned, it is largely a matter of chance whether fire or accident or embezzlement will befall him before the year is over, but so far as the whole community is concerned, these and similar contingencies are remarkably regular in their occurrence, and the chances of the contingency occurring and the rate of premium which should be levied to meet it may, after brief experience, be readily computed.

The risk may be undertaken either by a stock company or a mutual company. In the stock company the control is vested in a body of shareholders who charge a regular fixed rate or premium for the protection given, calculated to meet all losses and provide a dividend on the shareholders' capital. The mutual company has no share capital; it is a combination of persons who desire insurance on their lives or property, and collect either assessments varying each month or year so as just to cover the losses and expenses entailed, or averaged and fixed premiums of the other type.

The insurer or underwriter is the one agreeing to indemnify. The insured is the one to whom the promise runs. The premium is the consideration. The policy is the written contract. The risk is the event against which insurance is placed.

In Canada insurance has been the subject of much legislation by the Dominion parliament and the provincial legislatures. The Dominion and the provinces have the right to incorporate insurance companies; and both the federal and the provincial authorities have passed comprehensive Insurance Acts. Speaking generally, it is to the province that the power fails to regulate the contracts entered into between insured and insurer and to prescribe certain forms or clauses which must be included in insurance policies.

Many of the general principles of insurance law, as to insurable interest, the necessity of good faith, etc., apply to all branches of insurance, but it will be most convenient to consider separately the main forms, life, fire, marine and casualty insurance.

Life Insurance.

Life insurance, in its simplest from, is a contract to pay a designated person a certain capital sum or annuity in the event of the death of the insured. A later variation is endowment insurance, a contract to pay a certain sum or annuity to the insured himself if living to a certain age, or to a designated person if he dies before that time. Tontine insurance (so called from its deviser, Tonti, father of the Tonti who was La Salle's companion in his explorations, is a system of providing for distribution among the survivors of surplus funds accumulating from profits on investments or lapsed policies; it takes many forms of dividend or "profit" distribution. The term during which the premiums are paid may vary. In a straight life policy, premiums of a definite sum are paid at stated intervals up to the death of the insured; in a limited payment policy, premiums are paid for a specified term of years, say, twenty, or until the death of the insured, if he dies before the expiration of that time, thus concentrating the payment in the years of life when, normally, earning capacity is greatest. Term insurance covers only the risk accruing dur-

ing the specified term, say, five years, and thus in early life is low in rate, and adapted to the needs of a person whose present income is small but who expects later to receive a considerably larger income.

Insurance is, from the individual standpoint, of the nature of a wager, depending upon an uncertain future event. On this ground it is not open to anyone to take out insurance upon any lives or property unless he has a direct insurable interest in the person or property concerned: otherwise insurance contracts could be made an instrument of common gambling. In the case of life insurance there is the further consideration that it is not in the public interest—nor in the interest of the individual concerned—to make it profitable to any one who chooses to interfere to have the insured put out of the way. What, then, constitutes an insurable interest? Such a connection as would involve financial loss in case of death. A wife has an insurable interest in the life of her husband, and a husband, less generally, in the life of his wife, while a woman may also have an insurable interest in the life of her betrothed. A son or daughter may insure the life of a parent. Ordinarily a brother is not taken to have such an interest in the life of a brother, nor a nephew in the life of an uncle. A company may have an insurable interest in the life of a manager whose services would be hard to replace. A creditor has an insurable interest in the life of a debtor, up to the amount of the debt; even if this insurable interest ceases to exist through the payment of the debt the creditor may continue the policy in order that ultimately he may regain what the premiums have cost him. These restrictions, of course, apply only to the question, who may take out insurance upon the lives of others, not to the question, who may be the beneficiaries under the policies of others. A man taking out a policy himself and paying the premiums upon it may make anyone he pleases his beneficiary.

An application for insurance is usually made on a blank form drawn up by the company or prescribed by law. It contains representations upon the part of the insured, as to his own health or occupation or family record, which become part of the contract, and are considered warranties.

In ordinary contracts a party is not required to disclose

all he knows about the subject-matter; provided there is no misrepresentation, the contract is binding, even though one party knew and did not disclose certain defects. Insurance contracts, however, fall within the class where utmost good faith is required. Concealment of a highly material fact, particularly if bad faith is clearly evident, will void the policy. If a positive statement or representation included in the policy itself turns out to be false or is not fulfilled, if, in other words, there is a breach of warranty, the contract is voided. Usually by statute it has been provided that the warranty in question must be a material and not a technical one to have this effect. If by its terms a policy is indisputable after a period of years, it can only be disputed on the ground of positive fraud.

Nearly all policies now issued give definite surrender value tables. After a brief period, usually three years, a certain amount of cash may be received from the company in return for the surrender of the policy, or a certain amount, usually larger, may be borrowed from the company, standing as a lien on the policy (or really, borrowed from the beneficiary, whose consent is necessary in making the loan). It is also provided that the insured may at any time surrender the policy and in its place take a paid-up policy, in which the company agrees to pay a certain smaller sum at the death of the insured, without the payment of any further premiums. A fourth option is that of extended insurance: if the insured fails to pay the premiums, the policy, at full face amount, will be carried without further payment for as long a time as the surrender value at the period of default will provide. Thirty days' grace is usually permitted for the payment of a premium, other than the initial one.

The beneficiary under a policy (including the person insured if the policy is made out to his estate) has an assignable interest which he may transfer by an ordinary assignment. Policies, especially endowment policies, are frequently used as collateral security.

Fire Insurance.

Fire insurance is a contract whereby the insurer, in consideration of the payment of a premium, undertakes to indemnify the insured against loss of property, or injury to it, from fire, during a specified period.

Fire insurance may be taken only by one who has an insurable interest in the property. Any one who would suffer a financial loss by the destruction of the property has an insurable interest. Several persons may have an insurable interest in the same property. A owns a house, leases it to B, mortgages it to C and gives D an executory contract of sale. Each of these four has an insurable interest in the house—not the whole value, but up to the amount of his interest.

In the case of fire, as of life insurance, the contract is one of the utmost good faith, and the person seeking the insurance is required to disclose any facts that will affect the judgment of the other as to the risk. Any concealment of a material fact inquired into by the insurer, if made intentionally by the insured, will render the policy void. A material misrepresentation of fact, whether innocent or fraudulent, will render the policy void. Any representation embodied in the policy or expressly made a part of it, that is, a warranty, if not literally true or strictly carried out, will render the policy void. Even if the breach of warranty or misrepresentation of material facts do not concern the actual cause of the fire, they still give ground for declaring the contract void.

Loss by fire includes damage done by water in the attempt to extinguish the fire, or by theft during fire, provided the owner uses reasonable care in protecting the property. It includes loss by fire caused by lightning or by earthquake, but it does not cover loss by lightning or by earthquake unless explicitly stated.

A fire insurance contract is a contract of indemnity only. The utmost amount recoverable is the market or cash value of the property at the time of the fire, if this does not exceed the amount of the policy. If the loss is only partial, the amount recoverable is the difference in the value of the property before and after the fire the insurer may retain the right to rebuild or repair instead of making a cash compensation.

It is obvious that under this rule, in case of partial loss, there is no fixed relation between the amount of insurance carried and the loss paid. Take two owners of properties of equal value, side by side, one carrying insurance to the full value of his building, $20,000, and the other carrying only

$5,000; each owner is paid $5,000, though one had paid out four times as heavy premiums as the other. Of recent years, therefore, fire insurance companies have endeavored to introduce the principle of co-insurance. In marine insurance the full value of the property is supposed to be insured, and if not, in case of loss the insured has to pay a proportionate amount of it. The same principle underlies co-insurance. The co-insurance or average clause in a policy requires the insured to carry insurance equal to a certain percentage of the value of the property, usually eighty. If this is done, a reduction from the standard rates is given. If it is not done, then the owner is considered a co-insurer, that is, he insures himself to the extent of the deficiency, and bears that proportion of the loss. Assume the value of the building is $20,000; under the 80 per cent. co-insurance clause a $16,000 policy should be carried. If it is, and a fire causing $8,000 damage occurs, the full damage will be paid. If, however, the owner puts on only $8,000, he is considered a co-insurer to the extent of one-half, and the company will pay only half the damage, or $4,000.

An insurance contract is binding as soon as the agreement is completed, even though the policy has not been delivered or even issued. When the property insured is of great value, it is customary for a company to limit the amount it will assume, or to reinsure the whole or part of it with other companies. Where there are several policies on the same property, no more than the actual loss can be recovered from all, each paying its pro rata proportion. It is usually provided that if the property remains vacant and unoccupied for a certain length of time, ten or thirty days, the policy becomes void. Temporary absence on a visit does not constitute vacancy, but if an owner is to be away for a considerable length of time, it is advisable to secure from the agent a vacancy permit, and attach it to the policy.

An alienation clause is also included in the standard policy, rendering the policy void if any change takes place in ownership or possession, except change of occupants without increase of hazard, whether by contract or by legal process, unless with the knowledge and consent of the company.

After a fire the person entitled to make a claim must forthwith give notice in writing to the company and prove his

loss by giving particulars of the loss, and a statutory declaration as to the origin of the fire, the absence of any wilful neglect or arson on his part, the amount of other insurance, all liens and encumbrances, and the place where the property insured, if movable, was deposited at the time of the fire, producing further, if need be, books of account, warehouse receipts, invoices, or stock lists.

Marine Insurance.

Marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in the manner and to the extent agreed, against the losses incident to marine adventure; perils of the seas, fire, piracy, capture, detainments, jettisons and other perils. Of course the policy may be made more restricted, to cover only loss from fire, or loss from capture by enemies, etc.

No one may take out a policy of marine insurance who has not an insurable interest. An owner of the ship, the owner of the cargo, a charterer, members of the crew in respect of their wages, all may insure to the extent of their interest.

A contract of marine insurance is to a greater degree than any other insurance contract one of utmost good faith, since the insurer has relatively less opportunity of knowing all the facts. Concealment of a material fact, whether innocently or fraudulently, voids a contract, and warranties must be strictly performed. In the insurance of a ship or cargo there are always three implied warranties—(1) that the ship is seaworthy at the time of the commencement of the risk, staunch, properly equipped, and with a competent and adequate master and crew; (2) that there shall be no voluntary deviation or departure from the course fixed by mercantile usage, nor any unreasonable delay; and (3) that the voyage shall be for a legal purpose.

If the loss is total, the whole insurance may be recovered. A total loss may be actual or constructive, actual when the ship is lost or so badly wrecked that it cannot be repaired, constructive when the damage is so great that the cost of repairing or reclaiming it would be greater than its value. In the latter case the insured may abandon the ship or cargo to the underwriters, giving due notice. In case of partial loss recovery to the extent of the loss may be made, unless the amount

of the policy is less than the whole value, in which case, as in co-insurance fire policies, only that percentage of the loss is recoverable which the policy bears to the whole value.

General average is a term used to denote that when the goods of one owner are sacrificed for the common safety, as by being thrown overboard in a storm, all the owners of ship and cargo must make a proportionate contribution to recompense that owner. Such contribution will be covered by a general marine insurance policy. If, however, a policy is for fire alone, and is not a marine policy, the insurer is under no obligation to reimburse the insured for this contribution.

Casualty Insurance.

Casualty insurance is an indemnity against loss resulting from bodily injury or from destruction by various agencies.

Accident insurance provides for the payment of a certain amount upon death by accident, and a weekly or monthly indemnity for permanent or total disability, or a fixed sum for specific injuries such as the loss of an eye or a foot; medical expenses may also be included. In the United Kingdom, and in most of the provinces of Canada, laws have been passed making employers liable for accidents happening to workmen while in their employment, even if negligence on the part of the employer cannot be proved. The employer may be left to provide his own insurance fund, or to insure in a casualty or required to join other employers in the same or similar line employers' liability company or he may, as in Ontario, be of work, each group meeting all accidents in any establishments in its ranks by assessment on all the employers included. In England a professional football player has recovered from the club employing him for injuries received in a game, while in a Mississippi case death by lynching has been held to come within the terms of a policy insuring against "bodily injuries sustained through external, violent and accidental means." A German farm laborer injured while walking to Church on Sunday recovered damages on the ground that he was engaged in agricultural operations, since he was going to pray for rain when at church.

Fidelity insurance covers the risk of dishonesty from trusted employees. **Credit** insurance provides against the risk

of loss, usually beyond a certain amount or proportion, by the insolvency or dishonesty of customers. **Title** insurance guarantees a purchaser of property that the title is valid, and clear from liens or incumbrances. The scope of tornado, hail, automobile, plate-glass, steam-boiler, burglary, strike and other forms of casualty insurance, is sufficiently indicated by the name.

EXAMPLES.

Castellain v. Preston: Defendants in March, 1878, owners of certain land and buildings in Liverpool, insured the buildings against fire. In July they agreed to sell the land and buildings for £3,100 in May, 1879. In August, 1878, the buildings were damaged by fire, and in September the company paid the defendants £330 damages. In December, 1879, the purchasers completed the purchase, paying the full price, £3,100, for the land and damaged building. The insurance company then sued the vendors for the sum of £330 with interest. Held, that a contract of fire insurance is a contract of full indemnity and nothing more; that, as the defendants had received the full amount of the purchase-money as well as the insurance-money, the insurance company was entitled to obtain the benefit of part of the purchase-money received subsequently. "The contract of insurance with regard to marine and fire policies is a contract of indemnity, and indemnity only. The contract is that the assured shall in case of loss be fully indemnified, but not that he shall receive anything beyond a full indemnity."

Dalby v. Indian and London Life Co.: The plaintiff sought to recover £1,000 on a policy on the life of the Duke of Cambridge. At the time the policy was issued, he had an insurable interest in the life of the Duke, but this interest ceased entirely before the Duke's death. Held, that the plaintiff could recover. "The contract commonly called life-assurance, is a mere contract to pay a certain sum of money on the death of a person, in consideration of the due payment of a certain annuity (premium) for his life. This species of insurance in no way resembles a contract of indemnity. . . If there is an interest at the time the policy is taken out, it is not a wagering policy, and the true value may be recovered."

London Assurance v. Mansell: Mansell signed an application form for life insurance: to the questions, "Has a proposal ever been made on your life at any other office or offices? If so, where? was it accepted at the ordinary premium, or an increased premium, or declined?" He answered, "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year." After medical examination, accepted; later, company found that defendant, af-

ter insuring in other companies mentioned, and before applying to plaintiff, had applied to other companies but had been rejected: company therefore returned premium, and asked that temporary certificate given be declared void. Held, that concealment of material fact vitiated the policy. "Defendant's answer avoided answering question, and gave impression to plaintiff that he had never been rejected. . . Previous rejection, further, is a fact of great materiality."

Phoenix Life Insurance Co. v. Raddin (U. S.): Applicant was asked, "Has any application been made to this or any other company for insurance on the life of the party? If so, with what result?" To this inquiry no answer was made, but the policy was issued. Held, that the failure to disclose unsuccessful applications for additional insurance did not void the policy. The issuing of the policy without further inquiry was a waiver by the company of the right to inquire further. (Compare with decision last cited.)

Fish v. Cottenet: Held, that if an agreement for insurance is made with an agent authorized to bind the company, but through the negligence of the agent the application is not received by the company in time to be acted on before the loss occurs, the company is liable.

Armour v. Insurance Co.: Defendant issued a policy upon plaintiff's warehouse, by the terms of which losses should be apportioned between the different policies on the building; it also stated that any misrepresentation would void the policy. Plaintiff's agent, who applied for the policy, stated through mistake that there was already $200,000 insurance on the building, whereas there was only $30,000. Held, that the representation was material, and that the plaintiff could not recover.

Lyons v. Insurance Co.: A policy of insurance against fire was issued on furniture described as contained in a house on M. street. The insured, without the knowledge of the insurer, moved the furniture to a house on another street, a house no worse as a risk than the other. Held, that the insured could not recover, as the statement of the location of the goods is a continuing warranty.

Bevin v. Life Insurance Co.: Plaintiff advanced to Barstow $300 and certain personal property, under agreement that Barstow should go to California and work there for at least one year, giving plaintiff half his profits. Plaintiff then insured Barstow's life for $1,000. Held, that plaintiff had an insurable interest in Barstow's life and could recover the amount of the policy.

Lewis v. Insurance Co.: Held, that one brother did not, from the mere relatinoship, have an insurable interest in the life of another.

Cheshrough v. Home Insurance Co.: Plaintiff held a policy in the defendant company for $5,000, on lumber valued at $37,000; other policies to the amount of $$14,000 were in force; the policy of the defendant company provided that the insured should maintain insurance on the property to the extent of four-fifths of the cash value, and that, failing to do so, the insured should be a co-insurer to the extent of such deficit, and should bear his proportion of the loss. "The meaning of this clause is very clear, and holds plaintiffs bound either to procure from others, or to carry themselves, insurance to the extent, with defendant's policy, of four-fifths the value of the insured property. The word 'co-insurer' means neither more nor less than fellow-insurer, and is used to put plaintiff on the same footing with other insurers who issue policies and contribute ratably in case of loss."

Proudfoot v. Montefiore: Plaintiff in Liverpool had an agent in Smyrna to buy madder for him and ship it. The agent shipped a cargo and advised agent on January 12, sending the shipping documents on the 19th. On the 23rd the ship sailed, but it was stranded and the cargo destroyed on the same day. The agent heard of the loss on the 24th, and on the 26th wrote the plaintiff of the loss, but purposely abstained from telegraphing him. On the 31st, the plaintiff, after receiving the letters of the 12th and 19th, but before receiving the letter of the 26th, and without knowledge of the loss, obtained insurance. Held, that plaintiff could not recover, as his agent should have telegraphed: a material fact was concealed which rendered the policy void by reason of concealment and misrepresentation.

Tebbets v. Mercantile Credit Guarantee Co.: Defendant insured plaintiffs against losses in their business for 1893. The application, a part of the policy, stated the amount of their gross sales and total losses for the preceding fourteen months. The defendants agreed to purchase from the plaintiffs an amount, not to exceed $15,000, of uncollectable debts arising during 1893, in excess of one-half of one per cent. of their total gross sales and deliveries. The policy contained the provision, "This contract is issued on the basis that the yearly sales of the insured are between $1,800,000 and $2,500,000." Held, that this was not a stipulation that they would equal this amount, requiring that the one-half of one per cent. must be computed on at least $1,800,000, but that plaintiffs were entitled to receive their losses, not exceeding $15,000, in excess of one-half of one per cent. on their actual total sales.

Questions for Review.

1. Define insurance. What is its purpose? Is it gambling? Against what contingencies is it used to provide? Is insurance necessarily a risky business for the shareholders?

2. What is the difference between a stock company and a mutual company? Between the assessment and the level premium systems? Define insurer, premium, policy, risk.

3. What are the chief varieties of life insurance? For what circumstances is each adapted? What is meant by insurable interest? Does the policy become void when the interest lapses? (See Dalby v. Indian and London Life.) What representations will void a policy? What concealment? What is meant by surrender value, loan value, extended insurance?

4. What is meant by saying that fire insurance is a contract of indemnity only? Does it differ in this from a life insurance contract? Who may have an insurable interest in property? What representations or concealments make a policy void? What damages are covered by the ordinary fire policy? What is the co-insurance clause? When does an insurance contract become binding?

5. What distinguishes marine insurance from other forms? What risks does a marine insurance policy cover? Explain general average. Define casualty insurance. How have the operations of casualty companies been affected by recent legislation? Name other forms of insurance.

Questions for Written Answer.

1. Answer one of the Review questions.

2. Turner insures household furniture, located in the lower flat of an apartment house. Fire breaks out in the upper stories; it does not reach Turner's flat, but the water leaks through and damages his furniture. Can he recover? If he had moved his goods out to save them from the water, leaving them in the street opposite, and if part was stolen an hour later, could he recover the value of the goods stolen? If the rest of the goods left in the street were damaged by rain, falling immediately after, could this damage be recovered?

3. Williams insures his house; the policy has a clause providing for insurance against fire by lightning. Lightning strikes the house, tears off the roof, but does not set it on fire. Can Williams recover damages? Could he recover if the house had been set on fire by a tramp? if set on fire by himself while temporarily insane?

4. Hamilton insures his life in favor of his wife, Mary. Five years later he secures a divorce from her, and marries Jane. He seeks to make Jane the beneficiary under this policy. Can he do so?

5. The underwriters' association insists on an 80 per cent. co-insurance provision. The following losses are reported: (a) valuation $100,000, insurance policy $85,000, loss $10,000; (b) valuation $80,000, insurance $30,000, loss $5,000. In each case, how much will the company pay?

6. Emery has a building valued at $25,000, 80 per cent. clause applying, insured in three companies, as follows: $20,000 in A; $10,000 in B; $4,000 in C. The building is damaged by fire to the extent of $8,000. How much can Emery collect from each company?

7. Is an insurance company liable when the insured commits suicide? Is it liable if it has inserted a clause in the policy expressly stating that it will not be liable, and if the insured shoots himself while insane?

8. In an application for life insurance, Eaton is asked whether any of his brothers or sisters had died from lung brothers had died from such disease. The policy was issued. troubles. He does not answer the question, but in fact two Could it be declared void later?

LESSON VI.

Contract of Guaranty.

Definition. A contract of guaranty is a promise to be answerable for another's debt, default or obligation. The word guaranty is another form of warranty; in the former the Norman-French *g* has been preserved, in the latter it has been changed to *w*; compare *Guillaume* and *William*. A warranty may be said to be a guaranty of the title or quality of goods, while a guaranty is a warranty of credit.

The terms guaranty and surety are used as equivalents in common speech, though strictly speaking surety is a contract to make good the principal contract of which it is a part, while a guaranty is a separate and distinct contract parallel to another, known as the principal contract.

> "We, John Thompson as principal and Henry Wilson as surety, hereby agree to do so and so," would be a case of suretyship. "I, John Thompson, hereby agree to do so and so," followed by the indorsement, "I, Henry Wilson, hereby guarantee the performance of the within contract," would be a case of guaranty.

Kinds of Guaranty.

A guaranty may be conventional, legal or judicial. A conventional guaranty is one which is entered into by agreement between the parties. A legal guaranty is one required by law, and a judicial guaranty is one ordered by a court.

A guaranty is special when directed to a particular person, and general when addressed to the public.

A guaranty may be confined to a single transaction, or it may be a continuing guaranty, covering a stated period of time in the future; as:—

> St. Thomas, Jan. 10, 1915.
>
> In consideration of One Dollar, the receipt of which is hereby acknowledged, I hereby guarantee the payment of all goods purchased by John Watkin from Henry Galt during the remainder of this year, 1915, the total amount of said purchase not to exceed Two Thousand Dollars.
>
> William Nicol.

A guaranty of performance is sufficiently defined by its name and the following example, endorsed on a bond or lease or other contract:

For value received I hereby guarantee to the bona fide owner of the within contract, his heirs or assigns, the full performance thereof on the part of Frederick Simpson, together with all legal costs and expenses in enforcing such performance from Frederick Simpson and myself, or either of us.

Dated this twentieth day March, 1910.

Herbert Mitchell (SEAL).

A guaranty of fidelity, sometimes called guarantee insurance, is a contract whereby one or more persons or a company making a specialty of such bonding, guarantees the honesty and fidelity of an employee.

A guaranty of collection differs from a guaranty of payment. If the guarantor of a note writes, "I hereby guarantee the payment of the within note," and the principal debtor defaults payment at maturity, the guarantor becomes liable at once. If, however, he had written, "I hereby guarantee the collection of the within note," the holder must exhaust all other resources before coming on the guarantor.

Parties. There are three parties concerned, the debtor or principal, the creditor, and the guarantor or surety. The debtor or principal is the one who has undertaken to make a payment or perform some duty. The creditor is the one to whom the payment is to be made or to whom the performance of the duty is due. The third party or guarantor is the one who gives the promise to be answerable for the other's debt, default or obligation.

An agent may make a contract of suretyship or guaranty binding his principal, though the creditor should, as in all cases of important dealings through agents, make certain that the agent has proper authority to act.

Form. Reference has already been made (p. 42) to the Statute of Frauds, a famous English law passed in 1676 and since adopted, with slight variations, throughout the English-speaking world. To prevent fraud and perjury in proving contracts before the courts, it provided that certain contracts, or some note or memorandum of them, should be in writing, signed by the party or parties by whom the contract was to be carried out. Among these contracts was specified, "the

promise to answer for the debt, default or miscarriage of another." In all the provinces of Canada, therefore, the rule is that the representation or assurance made by one person concerning the character, conduct or credit of another by which the latter obtains goods or credit does not bind the guarantor unless it is in writing. An oral agreement to answer for the debt or default of another, even though borne out by a score of reputable witnesses, could not be enforced.

It is necessary, however, to discriminate clearly between promises to answer for the debt of another and promises to pay for goods supplied to another. The latter transaction is not a case of guaranty, and may be enforced even though not in writing. If John Thompson goes into Henry Wilson's store, with Thomas Tait, a friend or hired man, and says to Wilson, "Give Mr. Tait goods up to twenty dollars, and if he does not pay you by next first of August, I will," this is a case of guaranty, and cannot be enforced because the promise is only a verbal one. If, however, Thompson had said, "Give Mr. Tait goods up to twenty dollars and charge them to my account," or, "I will see it is paid," this is a contract of indemnity rather than one of guaranty, and would be a binding agreement. Thompson is here not answering for another's debt, but for his own debt. (Note, however, that even the latter form of transaction would be void, by another section of the same Statute of Frauds, which has been incorporated in our Sales of Goods Acts, if the amount exceeded the sum, thirty dollars or over, for which verbal sales of goods are binding— see page 42—unless the verbal contract is ratified by part of the goods being delivered or part of the purchase price being paid).

Consideration. In a contract of guaranty, as in other contracts, there must be a consideration. The consideration given should be named, though it is generally sufficient to use the words "value received." If the contract of guaranty is entered into at the same time as the principal contract, the same consideration suffices for both contracts. When the contract of guaranty is made after the main contract, a new consideration is required to bind the new agreement. The new consideration may be a sum of money paid to the guarantor, or a stay of proceedings or extension of time or other benefit

conferred upon the principal debtor or other detriment suffered by the creditor.

> "If you give T. White these goods, I guarantee payment for them. William Brown." The delivery of the goods binds both White's and Brown's promises.
>
> If goods have been already sold and delivered to White, and if Brown then undertakes to guarantee the debt, he must specify the consideration for his promise, as "In consideration of the sum of One Dollar, receipt of which is hereby acknowledged, I guarantee that the debt of Forty Dollars now owing to you by T. White shall be paid at maturity," or, "In consideration of your staying proceedings in the action you have commenced against T. White, I hereby guarantee, etc."

Acceptance. In case of a guaranty as to future advances, the offer of the guaranty should be accepted by the person in whose favor it is made, as in the case of any other offer. In England and in this country it is held that a delivery of goods or other performance of the act specified constitutes acceptance, but in some of the United States it is necessary for the creditor to give a written notice of acceptance.

Guarantor's liability. The extent of the liability of the guarantor will depend upon the main contract. He cannot be held liable for more than the amount of the debt guaranteed or the fulfilment of more than the obligation guaranteed. He may, by his contract, have specifically limited his liability to something less than the total liability of the principal debtor.

It is disputed whether in all cases notice must be given to the guarantor upon default of the principal debtor, but notice is usually required, and it is safer to give it in all cases. Under English law, the creditor may sue the surety before suing the principal debtor. Under Quebec law the surety is liable only upon default of the debtor, who must first be proceeded against. Much will depend upon the exact wording of the contract of surety or guaranty: if it is a guaranty of collection only, and not of payment, it is clear that the creditor must proceed against the principal debtor or realize on any collateral security he may hold before suing the guarantor.

Guarantor's remedy. The guarantor or surety, in his turn, who has paid the principal's debt or obligation, is entitled to certain remedies.

He has, first, the right of indemnity, as against the principal. He may sue and, if possible, recover, the amount paid, plus interest and costs.

He has, next, the right of subrogation, as against the creditor. If White borrows money from Brown, and gives as security certain bonds and also Black's guaranty, and if on default of payment by White, Black pays the debt to Brown, he is entitled to the bonds in pledge as security for his claim for indemnity against White.

He has, again, the right of contribution, from co-guarantors. If two or more persons jointly guarantee a debt, and one of them pays the whole amount on default by the principal, he may exact a pro rata contribution from each of his fellow-guarantors.

Discharge of Guaranty Contract. A guaranty contract, like any other contract, may be discharged in a variety of ways, (see Lesson II). The more important events or acts which discharge the guarantor are:

1. *Performance.* A guarantor is released if the principal fulfils his contract or pays the debt, or if the time for which he gave his guaranty expires.

2. *Discharge of the Principal.* If the creditor gives the debtor a release from the main contract, under seal, or based on a sufficient consideration, the guarantor will also be released. An involuntary release, such as a release in bankruptcy by force of law, does not discharge the guarantor.

3. *Agreement.* If the creditor by express agreement releases the guarantor, the latter cannot of course be held later.

4. *Revocation.* If the consideration for the guaranty consists of an act to be done in the future by the creditor, a notice of revocation before this act is done will release the guarantor.

5. *Alteration of Contract.* If the creditor alters the terms of the contract with the debtor, without the consent of the guarantor, the latter is discharged. If, for example, the guaranty was for the payment of a debt incurred in the purchase of specified goods, and other goods were substituted, the guarantor would not be bound.

6. *Extension of Time to Debtor.* If the creditor definitely agrees to extend the time of payment, without the consent of the guarantor, the latter is discharged, since the creditor and debtor have no right to prolong the responsibility of the guarantor. In Quebec, however, the guarantor is not discharged by such an extension, but he may sue the debtor to compel him to pay.

7. *Surrender of Securities by Creditor.* If the creditor surrenders to the debtor securities held for the enforcement of the debt, the guarantor is discharged to the extent he may be injured by such action.

8. *Retention of Principal after Knowledge of Dishonesty.* A person who has guaranteed the honesty and fidelity of an employee, is released if the employer, after knowledge of the employee's dishonesty, retains him in his service.

9. *Death of the Guarantor.* This does not usually terminate the liability; the estate of the guarantor will be liable. In the case, however, of a continuing guaranty, or where the consideration is divisible, as for a running account at a store, the executor may give notice of death to the creditor, and the estate will not be responsible for debts incurred after such notice. Where the consideration is not divisible, as in the case of guaranty of payment of a promissory note or performance of covenants in a lease, the guaranty is not ended by the death of the guarantor.

10. *Unenforceability of Main Contract.* If the main contract is illegal, and so cannot be enforced against the principal, the collateral contract of guaranty is also not enforceable. A guaranty of a gambling debt, for example, could not be enforced. If the main contract was procured by fraud, or lacked a valid consideration, the guaranty is not binding. If, however, the main contract is not enforceable simply because of defenses personal to the principal, as, for example, because the principal is an infant or of unsound mind, the guarantor will be held.

Questions for Review.

1. Define a contract of guaranty. Distinguish from warranty, from surety. What are the kinds of guaranty? Dis-

tinguish between guaranty of payment and guaranty of collection.

2. Who are the parties to a contract of guaranty? May an agent have power to bind his principal as guarantor? What is the Statute of Frauds? What contracts must be in writing to be binding? Under what circumstances may a verbal promise to pay for goods received by another be binding?

3. What is the general rule as to consideration in contracts? How does this apply to a contract of guaranty? Distinguish between guaranties given at the time of the main contract and afterwards. What is the rule as to acceptance?

4. When, if at all, does the guarantor become liable? What steps must the creditor take to enforce his claim? What remedies may the guarantor have?

5. In what different ways may a guarantor be released from his contract?

Questions for Written Answer

1. White buys goods from Black, promising to pay in thirty days. At the end of that time Brown writes to Black, "If you will give White another thirty days, I will be answerable." Black takes White's note for another thirty days. It is not met at maturity. Black sues Brown. Result?

2. Churchill gives a promissory note to Williams. Carson writes on the back of the note, "I hereby guarantee the collection of the within note." Churchill does not pay on maturity. Williams sues Carson. Result?

3. Gray orders a twenty-five dollar suit from Green. Black says, at the time, to Green, "If Gray does not pay for this suit when he promises, I will do so." Gray does not pay, and Green sues Black. Result?

4. Thompson guarantees Wilson's debt to Simpson. Afterwards Simpson gives Wilson a written extension of time for two months. At the end of this time Wilson does not pay, and Simpson sues Thompson. Result? Result if Simpson had simply neglected to press his claim for two months?

5. Answer one of the Review questions.

LESSON VII.

Principal and Agent.

If the business a man could do was limited to his personal activities, the modern world of commerce would never have come into existence. Mechanical inventions have wonderfully multiplied the reach and scope of the business man's activities: post and telegraph and telephone, typewriter and filing systems, have made it possible for one man to supervise a press of business beyond the imagination of earlier days. Equally necessary has been the power to do business through living instruments, through representatives.

Such representatives fall into two classes, employees who do some operative or mechanical act for their employer, and agents who make a contract for their principals. In the former case there are usually only the two persons involved, the employer and the employee, or, in the legal phrase, the master and the servant. In the latter case there are three persons involved, the principal, the agent, and the third party with whom the agent makes the contract. The law bearing upon the former relationship, known as the law of Master and Servant, will be considered in the following lesson. The law bearing upon the relationship of Principal and Agent will be summarized in the present lesson.

Formation of Agency Relationship.

Who May be a Principal? The general rule is that any person competent to contract is competent to enter into an agreement with an agent. An infant or a lunatic would be bound by a contract entered into on his behalf by an agent, if he would have been bound upon making a similar contract himself. The appointment of an agent by an infant, like his other contracts, is usually voidable at his option, but he is bound by the acts of his agent until he chooses to void the appointment. If an insane person appoints an agent at a time when he had not been judicially declared insane, and if the agent was not aware of the insanity, the appointment is binding. Corporations, of course, can act only through agents, directors and such additional agents as they may appoint.

Unincorporated associations, such as a canoe club or a missionary society, are not legal entities, that is, the responsibility for acts of agents falls not upon the club or society but upon the members individually and collectively. The extent to which members of such an association are bound will depend in part upon its constitution and by-laws: if they provide that a majority vote will bind all members, assent to the constitution involves assent to any action taken under it by the majority, such as appointing an agent. If no such rules exist, only those present at the meeting where the appointment was made, and voting for or acquiescing in the appointment, will be considered principals, and so liable for the agent's actions.

Who May be an Agent? Persons may act as agents who could not act as principals. All persons of sound mind, including infants and other persons of limited capacity, are competent to act as agents. The agent is looked upon merely as an instrument. The direction and the responsibility are assumed by the principal.

Agency by Contract. The usual method of entering into the relation of principal and agent is by specific contract, whereby one man appoints another to represent him in a certain transaction or in a general way. Such an agreement may be made orally, except (1) where by its terms the relationship is to continue longer than a year from the date of contract; in this case, by the Statute of Frauds, it must be in writing; (2) where the duties of the agent will include executing sealed instruments, his power to do so must itself be given in an instrument under seal. Such a formal authorization is usually expedient even where a verbal contract with the agent would be legally sufficient.

> **Tuttle v. Swett.** Swett agreed verbally to employ Tuttle for three years in making powder casks, at so much per day. Later he refused to give Tuttle work. Held, that the agreement could not be enforced, as the labor was not to be performed within one year, and the contract was not in writing.

Agency by Ratification. In the circumstances just noted, the principal authorizes the agent's acts in advance. He may, however, give assent after the act has been performed, and thus create "agency by ratification." Where an agent has gone

beyond his authority, or where one person without any authority whatever has acted for another, the principal, or the one for whom the action was done, may ratify the action. The ratification may be expressed in words or by assuming the benefits of the action. The assent must be to the whole act; he cannot ratify part and refuse to accept another part: burdens as well as benefits must be taken. Where such an act comes to the notice of the man in whose behalf it was alleged to be done, he may ratify or disaffirm it; silence is considered to imply consent. A principal can ratify only if the assumed agent claimed openly at the time of the transaction to be making the contract on his behalf. A principal may ratify an unauthorized signature made by an agent without intent to defraud, but cannot ratify a forged signature, a signature made with the intent to defraud.

Dempsey v. Chambers. Dempsey orders coal from Chambers. Manning, having no authority to represent Chambers, and without his knowledge, undertakes to deliver the coal, and while doing so breaks a plate-glass window. After learning of this, Chambers presents a bill for the coal, and Dempsey sues him for damages to the window. Held that Chambers is liable for the tort. He has ratified the acts of Manning, and by so doing has become liable for his negligent acts. Ratification establishes the relation of principal and agent from the beginning of the action which led to it.

Eberts v. Selover. Selover subscribed for a book which cost $10, on condition that his office fees as J. P. from that time to delivery, whatever they amounted to, be taken in payment. Rules printed on the subscription blank forbade agents making special contracts. The book was delivered, and Selover tendered $4.27, amount of receipts. Company sues for $10. Held, that if the company ratified the contract it must be upon the terms agreed. When plaintiffs discovered the special agreement, they could have repudiated the act of the agent and declined to deliver the book. They could not however ratify the part that favored them and repudiate the rest.

Keighley v. Durant. Roberts was authorized by Keighley to buy wheat on joint account for R. and K. at a certain price. Roberts, without Keighley's authority, bought from Durant at a higher price, in his own name, not telling Durant that he was buying it on joint account, though that was his intention. The next day Keighley agreed with Roberts to take the wheat on joint ac-

count. Both failed to take delivery and were sued by Durant. Held, that there could be no ratification by Keighley of Roberts' contract because he did not purport to act for him. "As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue or be sued on the contract. The chief exception to this rule is afforded by the doctrine of ratification. By a wholesome and convenient fiction a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? . . . On principle I should say certainly not. It is, I think, a well-established principle of English law that civil obligations are not to be created by or founded upon, undisclosed intentions."

Merchants Bank of Canada v. Lucas. Y. had been in partnership with the defendants, trading as the H. C. Company, but had retired from the firm and become general manager, with the power to sign drafts. He drew a bill of exchange for his private purposes, in the name of the defendants, on a firm in Montreal, which was discounted by the plaintiff bank. Before the bill matured Y. wrote to defendants informing them of having used their name, but saying they would not have to pay the draft. The bill purported to be endorsed by the company per J. M. Y., one of the defendants, and the other defendant, examining it in the bank, remarked that "J. M. Y.'s signature was not usually so shaky." J. M. Y. afterwards called at the bank and examined the signature very carefully, and in answer to a request from the manager for a cheque said it was too late that day but that he would send it the day following. No cheque was sent, and a few days before the bill matured the manager and solicitor of the bank called to see J. M. Y.; he admitted he had promised to send the cheque, and did so intend at the time, but would not now do so. Y. afterwards left the country, and in an action against the defendants on the bill they pleaded and proved that the signature of J. M. Y. was forged. Held, by the Supreme Court, that though fraud or breach of trust may be ratified, forgery cannot, and that the bank could not recover on the forged bill against the defendants.

Agency by Estoppel. The latter case is sometimes considered separately as constituting agency by estoppel. By estoppel is meant the stopping of a person, by a rule of law, from asserting a fact or claim. An agency by estoppel is created when one person allows another to represent himself as his agent, without taking steps to show that such agency

does not exist. If A represents to B that he is the agent of C, and C, upon learning of this, does not inform B to the contrary, an agency by estoppel is created,—C will be "estopped" from denying that A was his agent.

Agency by Necessity. This arises where the relationship between the parties is such as to make third parties assume that the authority of the principal had been given. A wife is the agent, by necessity, of her husband in all matters relating to household supplies or suitable articles for herself and family; the one providing the goods is under an obligation to prove that they were actually necessaries and that the family did not already have a sufficient supply. A shipmaster is the agent by necessity of the owner to buy supplies or arrange for necessary repairs to make it possible to continue his voyage.

Great Northern Railway v. Swaffield. The defendant failed to come to meet a horse consigned to him at a certain railway station. The railway company had no accommodation for the horse and could not communicate with the defendant before nightfall, and therefore sent the horse to a livery stable. Held, that they were entitled to do so and to charge the plaintiff with the expenses.

Reneaux v. Teakle. Reneaux sues Teakles for £33. for millinery supplied his wife during a period of fourteen months. Teakle, who has an income of £370 a year, proves that during the same period his wife had obtained millinery to the value of £150 without his knowledge. Held, that this evidence was admissible because showing that the wife was already sufficiently provided, and if so provided there could be no necessity for ordering the goods in question and therefore no presumption of authority from the husband to buy them.

Termination of Agency.

An agency may be terminated in various ways, by its own terms, by act of the parties concerned later, or by operation of law in certain contingencies.

By Terms of the Agreement. If, by its terms, the relationship is limited to a stated period, or to the performance of a specific service, it comes to an end when that time expires or that service is performed.

By Action of the Parties. Principal and agent may come to a mutual agreement to end the relationship: here no difficulty occurs.

The principal may decide to dismiss the agent, or revoke his authority. He has the *power* to do so at any time, with or without cause. He may not have a *right* to do so: if his action violates an agreement with the agent, he becomes liable to the agent for damages, but at the same time the revocation is binding. The ex-agent can no longer bind the principal: he may simply recover damages for wrongful dismissal. There is, however, an instance where the principal has not even the power to revoke the agency, namely, where the agency is coupled with an interest. An agent, for example, is appointed to sell a certain property, deduct his commission, and apply the balance on a debt owed him by the principal: this is an agency coupled with an interest, and the agency can be terminated only by mutual consent or by fulfilment. This must not be confused with the ordinary arrangement whereby the agent is to receive a percentage of the profit on his transactions: this does not constitute an interest in the sense here considered.

To protect himself, the principal should give notice of the revocation to all third parties concerned, all who have dealt with the agent in the past or who have knowledge of the relationship. Notice is usually given by a circular letter to all customers and by newspaper publication for the benefit of others. If notice is not received, a third party may hold the principal to a contract made later by the agent.

In the same way an agent has the power at any time to terminate the relationship, but he is equally liable to a suit for damages if he does so in violation of his contract and without the principal's consent.

By Operation of Law. The death of either party terminates the agency at once. Contracts made by an agent after the death of a principal, even though the fact of his death is not known to either the agent or the third party, are not binding. When the principal is declared insane, his agent ceases to have power to bind him; insanity of the agent also termi-

nates the relationship, The formal bankruptcy of either principal or agent terminates it, and equally so when the principal and agent belong to different countries a declaration of war between their countries ends or suspends the agency.

Obligation of Principal to Agent.

The obligations of the principal to the agent are summed up as compensation, reimbursement and indemnity.

The principal must pay the agent the compensation agreed upon. If none has been agreed upon, the law assumes an agreement to pay what the services are reasonably worth. The agent cannot recover compensation for illegal services.

The principal must reimburse the agent for any necessary expenses incurred, unless covered by the general compensation paid.

The principal must indemnify the agent if the latter is compelled to pay damages in consequence of any act performed within his authority and in the course of his employment. This is so only if the act was lawful or was lawful to the best knowledge of the agent.

Obligation of Agent to Principal.

An agent owes his principal obedience, judgment, and good faith.

He owes obedience. If he does not follow instructions he becomes liable for any loss that may occur. If X sends A goods to be sold for cash, and A sells them to Q taking his note or even his cheque, which proves worthless, A is liable for the loss.

> Whitney v. Merchants Union Express Co. The Express Company received for collection a draft with instructions to return it at once if not paid. Instead they held the draft until the drawee wrote for some explanation. They then failed to present it for two days after the drawee had received a reply, by which time the drawee had become insolvent. Held, that the Express Company was liable to the drawer.

The agent must exercise judgment and skill. The degree required is a matter for determination in each case: the court inquires whether the prudence and skill displayed were such

as might ordinarily be expected from prudent and skilful men, in similar occupation and similar circumstances. If A agrees to invest X's money and puts it into an enterprise which any ordinarily careful investor would know was fraudulent or unsafe, he is liable for any loss incurred.

> **Walker v. Penny.** Plaintiff instructed a lawyer to invest $5,000 upon good security. Defendant took mortgage on realty already too heavily mortgaged and lent balance to company which prudent men then believed to be of very doubtful solvency. Loss ensues. Held, that defendant must make it good.

The agent must exercise good faith. He cannot use his authority for his own benefit, and cannot buy the principal's property for himself or sell his own property to the principal without the principal's knowledge and consent. He cannot act for both his principal and a third party without their consent. He must keep and render accounts, and must keep his goods or money separate from those of the principal.

> **Morison v. Thompson.** Thompson, while acting as Morison's agent, on commission, takes from him an agreement of sale of certain land, resells it to X at a price higher than what he professes to Morison it brought; he pays Morison the smaller sum alleged to have been received for it, less his commission, and divides the balance with his partner Q. Held, that all moneys paid by X were received by Thompson in trust, and that Morison was entitled to recover all Thompson's profit and commission including the amount passed over to Q.
>
> **Wren v. Kirton.** An agent who, instead of keeping his principal's money separate from his own, deposits it in his own private bank account, is liable for all loss incurred when the bank fails.

The agent cannot delegate his authority, or appoint a sub-agent, unless when authorized by the principal or warranted by custom. He may, however, employ an assistant to carry out mechanical acts, not requiring independent discretion.

> **Allen v. Merchants Bank (New York).** Allen, in New York, drew on a Philadelphia merchant and deposited draft in the Merchants Bank of New York, which sent it to a Philadelphia bank. It was presented by the notary of the latter bank, but he did not protest it properly, and because of this negligence Allen lost. Held, that the bank receiving a draft is liable for any neglect of duty in its collection, whether arising from the default of its officers, its

correspondents abroad, or the agents of its said correspondents. This assumes the second bank is a sub-agent of the first.

Guelich v. National State Bank (Iowa). Guelich deposits a bill of exchange, drawn on a New York merchant, with the Iowa bank, which sends it to the Metropolitan Bank of New York for collection; the latter fails to present and protest in proper time. Held, that when the holder of a bill of exchange, payable at a distance, deposits it in a local bank for collection, he thereby assents to the course of business of banks, to collect through correspondents, and such correspondent banks become his agent and so directly responsible for negligence. This assumes that the first bank has the power to appoint another agent for its principal, not merely a sub-agent of its own.

An agent who signs a contract on behalf of his principal should make it clear that he signs only as agent; otherwise he may be held liable himself. If he simply signs himself, "Henry White, Agent," he is personally liable. If he signs, "William Johnson, per Henry White, Agent," or "Johnson Motor Company, Limited, per Henry White, Manager," or "Henry White, Manager, Signed for and on behalf of the Johnson Motor Company, Limited," the principal alone is bound. The signature, "William Johnson, per pro. Henry White," (for *per procurationem* or "as proxy for") indicates specially limited powers as agent.

Liability of Principal to Third Parties.

It is clear that the principal is liable upon all contracts made by his agent which are actually within the scope of the powers he conferred upon the agent. Difficulty arises, however, where the agent has exceeded or disregarded his authority. The question then becomes whether the agent possesses apparent authority, whether the third party was justified in assuming he had authority.

The third party is bound to exercise average prudence in satisfying himself of the agent's powers. In a very important transaction he will be supposed to inquire more closely into these powers, especially if given in a power of attorney, which will be construed strictly. Where, again, the agent is a special agent, employed only for one specific purpose, the presumption will be stronger that the agent has been given special in-

structions, but even here the principal cannot escape if he gave secret and confidential instructions which the agent disregards.

The apparent authority of the agent may be based upon actual and express authority, or may be incidental and necessary to carrying out the actual authority, or may be given by custom. A principal who sends goods to a commission merchant for sale is bound by the cutoms of the calling, which give such an agent wide scope, empowering him to sell at any price, for cash or credit, and with or without a warranty. A principal who engages a broker to buy stocks for him is bound by the customs of the stock exchange. An auctioneer can bind his principal and receive payment, though he has not, unless specially authorized, power to sell on credit or to give a warranty. A lawyer may accept payment in full for his client and give a release, but he may not compromise without the client's consent.

Where, then, the action of the principal or the custom of the trade is such as to warrant an ordinarily prudent person in assuming that the agent has the power he claims, the principal is bound, even if the agent has disregarded secret instructions or exceeded his actual powers or done what the principal had not realized he could do.

Howard v. Sheward. A horse dealer sells a horse through his brother who is put forward as having the authority of a horse dealer's manager, which includes giving a warranty with horses sold. The horse dealer had warned his brother expressly not to give a warranty, but the brother does so. The horse turns out not to be sound. Held, that the purchaser could recover damages from the dealer.

Brady v. Todd. A farmer sells a horse through his bailiff, who gives a warranty that it is quiet in harness. It is shown that it is not part of a farm-bailiff's general duties to sell horses for his master. Held, therefore, that the purchaser should have sought to find out what authority the bailiff had, and, not having done so, that he could not recover damages.

Edmunds v. Bushell. Jones carried on a wholesale business under the name of Bushell and Co. Bushell was his agent. Drawing and accepting bills was a customary incident in the business, and therefore within Bushell's ostensible authority, but Jones and Bushell had agreed privately that Bushell was not to have that

authority. Bushell accepted a bill in the name of Bushell and Co. Held, that Jones was liable at the suit of an endorser who had no notice that Bushell's authority was less than it appeared to be.

The principal is liable for the torts, or wrong and improper conduct of an agent, committed in the course of his employment and for the principal's benefit. If in the course of negotiations an agent makes false and fraudulent representations, to advance his principal's interests, the principal is liable. It is sometimes held that if an agent commits a fraud for his own, not his principal's benefit, but by means of instruments entrusted to him by his principal, the latter is liable. As a rule the principal is not liable for malicious wrongs or crimes of the agent, unless he has expressly authorized them. In the case, however, of certain public regulations adopted to secure the safety and welfare of the community, such as the rule prescribing a speed limit for motor-cars, the principal is held liable for acts of his agent breaking these rules, even though the principal has forbidden the agent to observe the rules.

Thieu v. Bank of British North America. The bank has a lien note on certain horses belonging to Thieu; its representative gives instructions to X to seize these horses; X seizes other horses belonging to Thieu, on two different occasions; the bank's representative ratifies the action of X in the second seizure and instructs him not to take back the first ones seized until he sees that he can get the right ones. Held, that such ratification makes the bank liable for X's acts.

Liability of Agent to Third Party.

If an agent exceeds both his real and his apparent authority, so that the principal cannot be held, the agent is liable to the third pary for the damages suffered.

If an agent makes a contract on behalf of a principal who turns out to be fictitious, the agent himself may be held to the contract.

If an agent acts for an undisclosed principal, that is, makes a contract in his own name without disclosing to the third party that he is really acting for a principal, both the agent and the principal are liable. The third party may choose which to hold responsible.

Kroeger v. Pitcairn. Pitcairn, agent for an insurance company, makes out and delivers to Kroeger a policy insuring the latter's store against fire. The policy contains a clause providing that petroleum must not be kept on the premises. Kroeger claims it is necessary to keep some, whereupon Pitcairn assures him that it will be permissible to keep one barrel. The store burns and Kroeger cannot recover from the company because of this clause. Held, that he can recover from the agent, who gave assurances in excess of his authority.

Questions for Review.

1. What is the importance of the relationship of principal and agent to-day? Distinguish between the relationship of master and servant and that of principal and agent. May an infant appoint an agent? revoke his agency? An insane person? Who are responsible for the acts of an unincorporated association? May an infant become an agent for others?

2. How may contracts of agency be formed? What contracts of agency must be in writing? under seal? Explain agency by ratification. What conditions are attached to authorization? What is agency by estoppel? What is the point in each of these cases noted?

3. In how many ways may agency be terminated? Has a principal power to dismiss an agent at any time, without cause? Has he a right to do so? What is an agency coupled with an interest? Has an agent corresponding powers and liabilities? What is the effect of the death of either principal or agent? of insanity of either? of bankruptcy? or war where the principal and agent belong to hostile countries?

4. What are the obligations of the principal to the agent? Of the agent to the principal? What degree of judgment or skill is requisite? May an agent delegate his authority? What is the point in each of the cases in this section? How should an agent sign to make it clear he signs on his principal's behalf? What is the meaning of "per pro."?

5. When does the principal become liable for an agent's contracts? What is real authority? Apparent authority? What is the effect of secret instructions? What is a tort? Is

a principal liable for the torts of his agent? Is the agent himself liable for them? What is an undisclosed principal? a fictitious principal? In each case, whom may the third party hold? What is the point in the cases cited?

Questions for Written Answer.

1. Answer one of the Review questions.

2. Burns, a farmer, on his way to town, is asked by a neighbor, Henry, to bring back a wheel for his binder, which is broken down in the midst of harvest, and agrees to do so without compensation. He forgets to bring back the wheel, and next day Henry's field of wheat is destroyed by hail. Henry sues Burns for damages. Result?

3. Thomson authorizes Misener to sell his land. Misener sells to Johnson, fraudulently representing it as well timbered. When Johnson discovers the fraud he sues Thomson, who has received the purchase money without knowing of the fraud. Is Thomson liable?

4. White agrees to work for Black for a year at $20 a month. At the end of six months he quits the employment without cause. What wages can he recover?

5. An agent, without authority to do so, accepts a bill of exchange in the name of his principal, expecting him to ratify. The principal refuses to ratify. Is the agent liable?

LESSON VIII.

Master and Servant.

Closely connected with the relationship of principal and agent is the relationship between employer and employee, or in the old terms which law, ever conservative, still retains, between master and servant.

Relations with Third Parties.

Contracts. The same person may be both agent and servant. You employ a gardener to look after your garden: this involves the relationship of master and servant. You send him to purchase tools or seed: for that purpose he becomes your agent. Every servant, in making contracts with third parties by his master's instructions, is considered an agent, and the rules summarized in the section on Principal and Agent apply to his transactions.

Torts. A tort is a wrong for which the law gives a remedy in damages; it is distinguished from a crime, a wrong which the state itself punishes as being not only an injury to the individual but an offence against public order and safety. The same act may be both a tort and a crime, though not all torts are crimes, nor all crimes torts. In the case of a tort committed by a servant against a third party, special considerations arise. If a servant, while engaged in his master's business, negligently injures a third person (other than a fellow-servant, a case which will be noted separately), the master is liable. The servant is also liable, since every one is liable for his own torts or wrongs. The injured person may, then, choose which he will sue for damages. If it can be shown that the injured person was also guilty of neglect, of contributory negligence, as the term runs, this is a valid defence, and he cannot recover from either master or servant. A railway engineer omits blowing the whistle at a dangerous crossing; a farmer after looking both ways and seeing no train, starts to cross, but is caught by the train coming suddenly round a curve. The railway company is liable for damages; so is the engineer. If, however, the farmer, knowing it was a dangerous crossing, had neglected the warning to "Stop, Look, and Listen," and

had shown negligence or rashness thereby, he would be unable to recover damages because of contributory negligence.

In the case of wilful or malicious torts, the servant is of course liable, and the master is also liable if it is clear that the act was committed in the course of the servant's work and in supposed furtherance of his master's interests. A motorman is held up by a coal cart creeping along in front of his car. After trying moral suasion, he rams the cart with the car, smashing it badly. The motorman is personally liable, and, on the assumption that he was trying to keep to schedule time and thus serve the company, the company is also liable. A common carrier is under specially strict obligations in this connection. If on the same street car a conductor assaults a passenger, simply to pay off an old grudge, and not because of any offence against the company, he would of course be liable, and in most jurisdictions the company would also be held liable.

> **Baillargeon v. St. George.** An employee is driving a wagon in front of a street car. He turns out for it at a corner where many are standing waiting to take the car, shouting to them to get out of the way, and driving recklessly through the crowd. A man attempting to board the car is struck down and the car runs over and crushes his leg. Held, that the master of the driver was liable.

Relations between Master and Servants.

Contract of Service and Hire. In order to constitute a contract of service and hire there must be an agreement, express or implied, by which one person is bound to serve and the other to hire and remunerate, for some determinate time. If the master merely agrees to pay as long as the servant remains, and it is therefore always optional with the servant to serve and with the master to employ, there is no contract of service and hire.

An express agreement may be made either orally or in writing. If the period of service is a year or longer, or if the service, whenever begun, will last until longer than a year from the date of the agreement, the contract must be in writing, signed by both parties. No one can bind himself, by either oral or written contract, to serve another for more than nine

years: any longer term is presumed to make the relationship approach too near slavery or serfdom for our age to tolerate.

If no express contract, either written or oral, has been made, it will be presumed if the service is performed. If, again, an express or implied contract has been made, but nothing agreed as to wages, it will be presumed that the wages customary for the kind of labor and in the district concerned are to be paid. Where the service is performed for a near relative, as for an uncle, the presumption is against its being for hire, and it is necessary for the person claiming wages to prove an express agreement.

When the agreement is for a definite period, a week, a month, a year, the employer may discharge the employee or the employee may leave, at the expiration of that time, without giving notice. The contract has expired by lapse of time, according to its own terms. If the agreement is for no definite period, and the employee is paid by the day, or by the week, or by the year, then, when either party wishes to end the relationship, the other party is entitled to "reasonable notice." This term is not defined by statute, but it is customary to give a week's notice in case of payment by the week, a month's where payment is by the month, and three months' where by the year. Discharge may take place without notice by the payment in advance of wages for corresponding periods. The servant, however, may not, without the master's consent, offer a month's wages in lieu of a month's notice.

If there is good reason for discharge, such as careless and incompetent work, or for leaving, such as cruel treatment, notice is not required. If an employee is discharged for good and sufficient reason, he cannot claim wages earned, but not due at the time of discharge. If he has been wrongfully dismissed, he is entitled to arrears of wages and to an additional sum in lieu of notice. If he is wrongfully dismissed, but obtains another job before the period for which the notice should have been given expires, the amount so earned will be deducted from what he is entitled to in lieu of notice.

It is sometimes important to distinguish between a contract of service and hire and a contract for purchase of goods or other contract for profit. If Williams hires Burns to work

by the day building a boat, and the boat is destroyed, the loss falls wholly upon Williams. Burns was to get nothing but his wages, and to that he is entitled. If, however, Burns agreed with Williams to build the boat for a specified sum, Williams providing the materials, Burns stands to make a profit if he can finish the work in good time, and therefore shares the risk. In case the boat is destroyed, Williams loses his material and Burns his time and work. If, again, Burns agrees to build a certain kind of boat for $100, furnishing the materials himself, and if the boat is burned before completion and delivery, the loss falls wholly upon himself.

Injury to Employee.

The common law gives a man who is injured by the negligence or malice of another the right to recover damages from the one causing the injury. If the man injured happens to be an employee, and if he is injured in the course of his employment, the common law affords him the same means of redress. That is, he can recover damages if he can prove the employer guilty of negligence. The employer is obliged to provide a reasonably safe place in which to work, with reasonably safe machinery, and reasonably prudent and competent fellow-servants. He is not obliged to ensure safety, or to provide all the newest and most expensive safety devices: he is required to take only those precautions which a reasonable and prudent man normally takes. Only in case of such failure is he liable for damages if a workman is injured. If, again, the workman was aware of the defect and yet remains in the master's employ, he is taken to have assumed the risk, and cannot recover; if, however, he had called attention to the defect, and the employer had promised to repair it, and if before this was done he was injured, he could not be held to have assumed the risk and could recover damages. If, again, the employee has shown contributory negligence he cannot recover.

Poll v. Hewitt. Plaintiff was injured in an accident which resulted from a defect in the machine he was working, the defect being the breaking of a string operating a brake. It appeared that the plaintiff knew of the defect and of the likelihood of an accident, as he had often replaced the string when worn, and that

he continued to work the machine without complaint. Held, that he was aware of the defect and could not recover.

Under the common law a master is not liable to one servant for an injury caused by the negligence of a fellow-servant. The theory is that upon entering the employment the employee sized up his fellow-servants and assumed the risk of their imprudence as one of the conditions of the contract. In such a case, then, the only recourse is to sue the fellow-servant. The master, however, is liable for an injury caused by the negligence of a vice-principal, such as a superintendent or foreman. A vice-principal is a person charged by the master with providing a safe place to work, safe tools or machines, competent servants, suitable rules and regulations, and warning of any unusual danger. If he is negligent in any of these services, the master is liable. A fellow-servant, as distinguished from a vice-principal, is one who performs operative acts. In Quebec, it should be noted, as distinct from the English law provinces, the fellow-servant rule is not in force. There the master is held responsible for the negligence of any of his employees, whether vice-principals or ordinary workmen.

Plant v. Grand Trunk Railway. Plaintiff sued for death of her husband, a section-hand employed with three others under a foreman, clearing snow from the track. The foreman suddenly saw a freight train approaching, told the men to look out, and walked toward the train, waving a flag. Plant and one of the other men ran in front of it with the hand-car till struck and killed. The brakesman on the train contended that the brakes were defective and that the train could not therefore be stopped on signal. It was proved, however, that the defects pointed out could easily have been mended, that they would not be such as to make it impossible to stop the train, and that at the next station they did stop it effectively. Held, that these facts showed that the negligence was not on the part of the company but of their servants engaged in a common employment with the deceased, and for which therefore defendants were not responsible.

The common law provisions upon this subject have long been found unsatisfactory. They give the workman no redress for that large class of accidents which are not due to any one's special negligence but are risks of the trade. The fellow-servant doctrine loses all reasonableness when applied to employees of a great corporation who possibly have never seen

each other, as, for example, a conductor and a switchman on a large operating division of the Canadian Pacific. Even if the workman can prove that the injury was due to the employer's negligence, and that he was not guilty of contributory negligence, it often requires an expensive law suit to secure damages, with the risk of appeal to higher courts. It means, too, that he must antagonize his employer by going to law against him. In consequence of these and other considerations practically all western countries have now established workmen's compensation or accident insurance laws, throwing the burden of compensation upon the employer in all cases save those of wilful negligence on the workman's part. Compensation is usually provided in the act at such a percentage of one or more years' earnings, with a maximum limit, varying according to the degree of incapacity caused. In case of permanent disability the compensation usually takes the form of a pension. It is assumed that this burden, like the premiums which the employer pays for fire insurance will, by being made universal, become a part of the cost of production and thus partly be thrust forward upon the consumer in the form of higher prices. In part, presumably, the burden will simply disappear; in face of this automatic obligation, the employer will take greater pains to ensure safety.

Macdonald v. Canadian Pacific Railway Company. The plaintiff, a brakeman, was the victim of an accident, as the result of which he had to have his leg amputated above the knee, whilst one of his arms was so badly crushed that he will be permanently deprived of the use of it. Macdonald was earning $55 per month; the court found that his earning power had been reduced seventy-five per cent., namely, by the sum of $495, and that he was thus entitled to an annual rente or pension of $247.50, being one-half of said reduction. The company was accordingly condemned to pay this rente. The company appealed, contending that it could not be condemned to pay a rente greater than the interest on $2,000, and that the incapacity to work resulting from the accident was not three-quarters of the victim's power preceding the accident. Appeal dismissed.

Lecuyer v. Quinlan. An action was brought by the widow of William Lecuyer against John Quinlan for damages for the death of her late husband, who was drowned whilst on his way home from work. The deceased was engaged by Quinlan to work

on a building erected by the latter on the south shore of the canal about a mile and a half west of the Cote St. Paul bridge. Other contractors were engaged on similar work in the same locality, and it was the custom of the workmen to make use of a rowboat to cross the canal and gain the north shore in order thence to take the car citywards. On November 12, 1913, an overladen boat was swamped in the middle of the canal, and plaintiff's husband, in company with several other workmen, was drowned. Plaintiff claimed an award by virtue of the Workmen's Compensation Act, alleging that the mishap had occurred in the course of and as a result of his daily work; as, taking into consideration the particular circumstances presented by the case, the going and coming of the deceased in the manner mentioned was a necessary consequence of his employment at that particular place. Found, that the boat was not the property of the defendant, that it was the property of another contractor, whose workmen used it to gain passage across the canal. Defendant, in the contract of hire, had not undertaken to ferry deceased across the canal; the deceased himself, of his own volition, had chosen this particular means to hasten his homeward journey. At the time of the mishap the deceased was free, was not under the surveillance of the defendant, and was outside of the place in which he had been engaged to work. Hence it was held that the mishap was not one which fell under the Act. The suit was dismissed with costs.

Martin v. Iovibond & Company, Limited. By the British Workmen's Compensation Act, 1906, a workman injured by accident is entitled to compensation only in cases where the accident is one arising out of and in the course of the employment. Martin was employed by a brewery company as drayman, his duties being to deliver casks of beer from a dray at various public houses and private houses. His working hours were from 8 a.m. to 8 p.m., no intervals being recognized for meals or refreshment, as he was generally at a distance from his home the whole day. One day while on his round he drew up his dray on the near side of the road, and crossed the road to a public house to get a glass of beer. The public house did not belong to his employers. He was only away from the dray for about two minutes, and on crossing the road to return he was knocked over by a motor-car and killed. His dependents applied for compensation, but their claim was resisted by the employers on the ground that the accident had not occurred in the course of the employment. The County Court judge, however, made an award of compensation. The employers appealed. They contended that the workman had left the sphere of his employment entirely for his own purposes, and that, though he was allowed t oleave his dray in order to obtain refreshment, there was a distinction between being allowed to do

such a thing and doing that thing in the course of employment. Also, it was contended that the risk of being knocked down by a motor-car in the street was not a reasonable incident of the employment, and not one to which, by the nature of his employment, that, though he was allowed to leave his dray in order to obtain he was particularly exposed. The court of Appeal dismissed the appeal, holding that the leaving his dray to get refreshment was a reasonable incident of his employment, and that the accident had arisen out of and in the course of the employment.

Alien Labor Act.

In 1885 the United States passed a Contract Labor Law, prohibiting the entrance into that country of laborers who had been induced to immigrate by offers or promises of employment. The act was not to apply to professional workers, or to skilled artisans of a class not to be found in the country. The law was passed as a result partly of trade union pressure, and partly as the result of revelations of attempts of employers in coal mining, the packing industry and other occupations to bring in hordes of low-grade European workers at low rates of pay. It was not directed against Canadians, but the officious zeal of two or three inspectors at border points in so enforcing it led to an agitation for a similar law on our side, which was eventually passed.

The Dominion Alien Labor Act provides that "it shall be unlawful for any person, company, partnership or corporation in any manner to prepay the transportation or in any way to assist, encourage or solicit the importation or immigration of any alien or foreigner into Canada under contract of agreement, parol or special, express or implied, made previous to the importation or immigration of such alien to perform labor or service of any kind in Canada." The act applies only to countries having similar laws, i.e., the United States. Professional workers, domestic servants, personal friends who intend to become citizens, workmen of a class not to be had in Canada, and personal employees of foreigners temporarily residing in Canada, are exempted from the provisions of the act.

Hinton v. Windsor Hotel Co. During a strike of the waiters in the hotel, five waiters are imported from New York. It is shown that they came in response to a New York advertisement,

that they were engaged in New York at $30.00 a month, and that their way was paid in advance. Held, that this is a clear violation of the Alien Labor Act, subjecting the company to a penalty for each offence.

Questions for Review.

1. What is meant by servant, in legal usage? May the same person be both agent and servant? What is a tort? Distinguish from a crime. Who is responsible for an agent's negligent torts? What is the effect of contributory negligence? May a principal be held responsible for malicious torts?

2. What constitutes a contract of service and hire? What agreements of service must be in writing? For how long a term may one bind himself? Why not longer? In what case will a contract be presumed? What is the rule as to discharge for cause? for discharge without special cause? for leaving under such circumstances? Distinguish between contracts of service and contracts involving risk and profit.

3. What is the redress open by common law to any man injured by the negligence of another? In the special case of employees, what is the common law redress? What are the employer's obligations? What defences may he offer? What is the fellow-servant doctrine? What is a vice-principal? Explain the Quebec law on this point.

4. What objections have been made to these common law provisions? What has been done to meet the situation? On whom is it expected the burden will fall? What is the point in each of the cases cited?

Questions for Written Answer.

1. Answer one of the Review questions.

2. State the provisions of the Dominion Alien Labor Act, and give your opinion of the wisdom of the law.

3. A youngster steals a ride on a freight train. A brakeman, after warning him not to do so, discovers him and throws

him off while the train is in motion. The boy is injured. Is the railway company liable?

4. Thompson sells tickets for the Hoboken Elevated Railway. Williams buys a ticket and lays down a $5 bill. Thompson, after giving the change, concludes the bill is a counterfeit and has Williams arrested. The bill proves to be good. Whom may Williams sue for false imprisonment?

LESSON IX.

Read Geldart, **Elements of English Law**, Chapter V.

I. Property: Real and Personal.

"There is, perhaps," declares Geldart, "nothing more difficult to give than a precise and consistent meaning to the word 'property'."

In the first place, we find confusion between two uses of the term. In common speech, 'property' usually denotes the thing owned, the land or cattle or jewellery. In legal phrase, it means also the rights which are exercised over such things. Both uses of the word are legitimate. The term may be used, concretely, to denote an object, land or chattel, in which one may have a proprietary right, or abstractly, to denote the right, control or interest one has in or over such an object.

Again, it is necessary to distinguish between **real** and **personal** property. Ordinarily real property or real estate is taken to mean all land and houses and other immovables, while immovables are termed personal property. The legal distinction, however, so far as the English-speaking provinces of Canada are concerned, is not so simple and logical. Real property, in the second sense of the term property mentioned above, consists only of the estate in land, (the interest in or right to land), known as a freehold estate. All other estates in land, or rights to land, e.g. leaseholds, mortgages and liens, are deemed personal property. Personal property also includes all interests in movables.

The distinction has much practical importance. (i) In default of a will, real property descends to the heir, while personal property goes to the personal representative or administrator to pay the debts of the deceased and then to be distributed among the next of kin. (ii) Real property may be transferred to a purchaser only by a deed under seal, whereas personal property may be transferred by deed not under seal or by mere word of mouth or by mere delivery. (iii) A wife's right of dower or a husband's right of curtesy exists only in real, not in personal property. (iv) Ordinarily rights in real property are governed by the law of the state where it is situated, whereas rights in personal property are governed by the law of the owner's place of domicile.

The Civil Code of Quebec makes the distinction not between real and personal property, but between movables and immovables.

Property, again, may be classified as **corporeal** or **incorporeal.** Corporeal property is tangible, incorporeal intangible. Corporeal real property includes land and its fixtures. Incorporeal real property includes interests arising out of or annexed to land, not amounting to ownership in it, such as an easement, a right of way over land. Corporeal personal property consists of physical movable things. Incorporeau personal property consists of rights granted by government, such as a patent, rights of action, such as a right to collect a debt, stocks, bonds, negotiable instruments.

II. What is Land?

The term land in law includes not only the soil but whatever is permanently (or at least relatively permanently) affixed to the soil, over or under the earth's surface.

Air. The old common law rule conceives of an owner's land as pyramidal in shape, running to an apex at the earth's centre, and extending indefinitely into space. An owner of land may therefore prevent an attempt to stretch wires above it, unless the state has expressly given authority. Aerial navigation will compel modifications and new interpretations of this old rule. One owner of land may not, without permission, erect a building of which the eavetroughs would overhang his neighbor's land. If the branches of a tree growing in one man's land overhang the property of his neighbor, the latter may cause the branches to be cut at the line, though so long as the branches remain any fruits upon them belong to the owner of the tree. If a tree stands on the border line, it and its fruits belong to both owners, and it cannot be destroyed without the consent of both.

Water. In the case of navigable waters, the land under the water ordinarily belongs to the state, and the property of the adjoining or riparian owners extends only to high water mark. Such riparian owners are entitled to reasonable enjoyment of and access to the water, but their only exclusive right is the right to erect piers such as will not interfere with public navigation.

In the case of non-navigable running waters, the bed or land under the stream usually belongs to the owners on either side, each holding as far as the middle line of the river. Such owners have the exclusive right to fish or cut ice in their respective parts of the stream and to divert the water for irrigation or power purposes provided they return it to the stream or do not substantially affect the similar rights of owners further down the stream.

In the case of small standing waters, the owner of the bed owns the water above it, and has excclusive title to its use.

In the case of subterranean waters, no exclusive control attaches to the holders of surface rights. If A drills a well on his property and obtains a good flow of water, and if later his neighbor B drills a well which strikes the same subterranean source and lowers or dries up A's well, A has no redress.

Vegetable Products. A distinction is drawn between **natural** and **industrial** fruits. Fructus naturales or natural fruits are those which are the spontaneous product of the soil, or which remain from year to year without special planting or cultivation, such as grass and trees. Fructus industriales or industrial fruits are those which must be sown yearly or which require special training and cultivation yearly, such as wheat, potatoes, and even hops.

Natural fruits are considered real property when attached to the soil. Industrial fruits are personalty, and a sale of them must conform to the rule of the Statute of Frauds regarding sale of personal property over a certain value. According to Quebec law, crops uncut, fruits unplucked and standing trees are immovable, while cut grain, plucked fruit and felled trees are movables.

Fixtures. A fixture is an article, originally a chattel or personal property, which has become permanently annexed to land or realty and is considered a part of it. The question under what circumstances an article of personal property shall be considered so merged into the realty as to pass with it is one of much practical difficulty. A man purchases a house; do the chandeliers become his property? A tenant puts in a counter or a water-heater do they become the property of the landlord when the lease expires? If a clear written agreement

has been made, well and good, but if, as often happens, no contract was made, it becomes necessary to determine the respective rights of both parties from the circumstances.

The old common law rule laid emphasis upon the manner of attachment. It was held, for example, that when shelves or counters were attached to the building by means of nails, they became part of the realty; when attached by screws, they remained personalty and could be removed by the tenant who had put them in.

The modern tendency is to lay emphasis rather upon the relation of the parties and upon any indication whatever of the intention of the party making the addition. Broadly speaking, the rules at present existing may be summarized as follows:

To be considered a fixture an article must be either actually or constructively attached to the realty. A building erected on a piece of land, a fence post dug in the soil, a water-pipe nailed or screwed into the wall, and even heavy machinery held to the floor by its own weight would be considered actually attached; a key of a door or storm windows would be considered constructively attached.

If an article actually attached cannot be removed without material injury to itself or to that to which it is attached, it must be considered a fixture, part of the realty.

If it can be removed without such injury, then its status depends on the intention or relationship of the parties. (i) If the party attaching the article is the owner of the land, the presumption is that it was intended to remain permanently, and that it has become a fixture. When the owner sells or mortgages the land the fixture goes with it, unless express stipulation is made to the contrary. (ii) If the party attaching the article is a tenant, the presumption is that it was intended to serve his temporary purposes, and that it may be removed. If it is to be removed, this should be done before the tenant gives up possession.

III. Easements.

It was seen above that there is a kind of real property which is not tangible, namely, a right exercised by one person over the land of another. Such a right is termed an **easement.**

The chief easements are rights of way, water, air, light, and support.

An easement may be acquired in various ways: (i) By contract between the owners of the two tracts of land. (ii) By prescription or uninterrupted use. Where a particular person or the general public is permitted to use a way or passage through a certain field or lot without any kind of agreement or remuneration being made or offered, for a period of twenty years, a prescriptive right to its use is acquired. At any time before the twenty years expire, the owner may block the claim by barring the path, or may require the user or users to make written acknowledgment that the way is used not as of right but by express permission. (iii) By dedication. The owner of a large tract of land may set apart an area for a street. (iv) By necessity. If the owner of such a tract sells a lot or field in the centre, a right of way across the land to this field necessarily falls to the purchaser, so long as no public means of access exists.

Easements may be extinguished by contract, by abandonment and by merger (that is, when the two lands come into the ownership—not merely the possession—of the same person).

A right of way is the right to pass over another man's land. It may attach to an adjoining property, or be personal to the owner of such property, dying with him, or may be a right of the general public. The owner of the land still owns the way, and may prohibit any use of the way save for passage.

The right of water has been already noted.

The right of support is a right which an owner has to have his land supported by that of his neighbor. The neighbor cannot excavate his own land in such a way as to cause the adjoining land to cave in. This right does not extend to buildings, unless standing so long as to have acquired a right of prescription, but merely to the land.

The right of light, air and prospect is no longer acquired by prescription in this country. Formerly an owner of one tract of land could prevent a neighbor darkening his windows or cutting off a splendid view by a building or fence, but this right no longer exists except where it has been acquired by contract. A familiar form of such contract is found in the

restrictions imposed by a seller upon the purchasers of lots in a desirable neighborhood, or accepted by agreement among the various owners of such lots. For example, it may be provided that no house may be erected of less than a certain value, or nearer than a certain distance to the street line.

IV. Estates in Land.

An estate in land is the interest or right which a person has in real property. There are many different kinds of estate or interest, and there may be different estates in the same tract of land.

Estates may be classified according to the quantity or duration of interest, the number of owners, and the time of beginning enjoyment.

From the first standpoint, that of quantity or duration of interest, estates may be classified as follows:

- Estates in Land
  - 1. Freehold Estates
    - In fee, or, of inheritance.
    - For life
      - Conventional
      - Legal
        - Dower
        - Curtesy
        - Homestead
  - 2. Leasehold Estates
    - For years
    - At will
    - From year to year
    - At sufferance

Many of the terms and rules of real property law are an inheritance from the days when the feudal system was in force in England. Under this system the sovereign was supposed to have the absolute title to all real property. The King granted the use of large tracts of land to his vassals in return for military service or other compensation. Each vassal in turn gave the use of parts of his land to his own followers for military services or for payment in money or kind. The estate of the tenant was termed a feoff, feud or fee.

A freehold estate is one which lasts for an uncertain period, at least for the life of one person. Freeholds are divided into estates in fee or of inheritance, that is, estates which upon the death of the owner pass by descent to his heirs or under the provisions of his will to his devisees, and life estates, interests lasting only for the lifetime of the owner or for the lifetime of another.

Of estates in fee, the most important is the estate in fee simple, the nearest approach to complete and absolute ownership of real property. It is an inheritable freehold, of indefinite duration. Estates in fee-tail, which descend only to one's heirs in the direct line and may be limited to particular heirs, e.g., the eldest male heir, are better known in the United Kingdom than in America.

Life estates, again, fall into two classes. Conventional life estates are those which are created by convention or agreement, by deed or will. Legal life estates are those which are created by law, irrespective or the original owner's wishes. A life estate of the first class may be for the tenant's own life or for the life of another person. A life estate of the second class may be an estate of dower or an estate by the curtesy, or a homestead estate.

Dower is the life estate which a wife takes by law on the death of her husband in the lands which he held in fee during the marriage and which she has not released by joining him in a deed of conveyance or otherwise. The dower is a one-third interest in this real property. The husband cannot deprive his wife of this right of dower during his lifetime by selling or mortgaging his real property; unless she has barred her right to dower by signing the deed or mortgage, her claim still holds good against the property. The right of dower ceases if the marriage is legally dissolved. If the husband dies possessed of real estate and leaves a will, the widow may either take the part left her by the will or else the one-third dower interest; if the will does not state that the bequest is in lieu of dower she may claim both. There is no dower right in lands in which the husband had only a life interest. The dower right attaches to every piece of property held by the husband, no matter for how brief a term if he buys a tract of land to-day and sells it to-morrow, his wife's right of dower attaches. A wife bars her dower by signing a deed, but in signing a mortgage she only subordinates her right to that of the mortgagee and upon her husband's death she is entitled to dower, calculated as one-third of the selling price of the land, not of the surplus above the mortgage. If, however, the mortgage is given at the same time that the land is purchased, that is, if it is a purchase money mortgage, the dower right at-

taches only to the surplus above the mortgage. Thus if A buys a farm from B and as a part of the same transaction gives B a mortgage for two-thirds the price, A's wife gets a dower interest only in the value of the farm above the mortgage.

The right of dower does not exist in all jurisdictions. It is determined by the laws of the province or country in which the land is situated, not by the laws of the place where the husband and wife live, if that is different. Dower right exists in Prince Edward Island, Nova Scotia, New Brunswick and Ontario. It does not exist in Manitoba, Saskatchewan, Alberta, the Yukon or the Northwest Territories. In British Columbia, Newfoundland and England, the wife has no dower unless the husband dies without having disposed of his lands during his lifetime or by will. In Quebec legal or customary dower consists in the use for the wife and the ownership for the children of one-half of the immovables which belong to the husband at the time of the marriage and of one-half of those which accrue to him during marriage from his father or mother or other ascendants. In place of this legal or customary dower, a different share may be agreed upon in the marriage contract.

Curtesy is the life estate which the husband takes, upon the death of his wife, in the real property which she held during marriage, provided that a child has been born capable of inheriting it. It is not necessary that the child should be living at the time of the mother's death; if it lived only a moment, that would suffice to vest this estate in the husband.

A homestead estate is an interest secured by statute in most of the states of the United States and the provinces of Canada, to a householder having a family, free from execution or attachment by creditors. This homestead estate, or exemption, as it is called in Canada, is granted to protect the family from destitution. It is usually provided that an article is not exempt from seizure if the debt was incurred for that particular article. The homestead estate may be extinguished in two ways, by abandonment with intention not to return, and by conveyance. It is usually provided that a conveyance, to be effective, should contain an express release of the homestead or exemption by both husband and wife. The list of

exempted chattels varies in the different provinces. In Ontario, for example, it includes necessary wearing apparel; beds and bedding; certain household utensils; necessary food and fuel actually provided, not exceeding $40 in value; one cow, six sheep, four hogs, and twelve hens not exceeding $100 in value; tools of the debtor's trade up to $100, and fifteen hives of bees.

Of estates less than freehold, there are four kinds. (i) An estate for years is the interest secured by a contract for the posssesion of real property for some definite period, ten years, one year, six months. (ii) An estate at will is a tenancy which may be terminated at the will of either lessor or lessee. If a tenant of a farm under such a lease sows a crop and is compelled to leave before it is harvested, he is entitled to enter upon the land and take away the crop. A tenant for years whose lease expired before harvest would not, however, be entitled to the crop. (iii) An estate from year to year is a tenancy for a week, month, quarter or year certain, continuing for a succsesive similar period unless terminated by reasonable notice. (iv) A tenancy by sufferance is a tenancy which arises when a tenant remains in possession at the end of his term without the landlord's permission. If the landlord consents to such possession, the tenant's estate becomes one from year to year.

The second basis of classification of estates is as to the number and connection of their owners.

The common form is the **estate in severalty,** held by a single owner in his own right. An **estate in joint tenancy** is one granted to two or more persons jointly, so that when one of the persons dies the survivor or survivors take his share to the exclusion of his heirs or devisees. There is no right of dower in a joint estate, and only the last survivor may devise it by will. An **estate in common** is one held by several distinct titles; each person holds an undivided interest under separate instruments or under one instrument which makes clear the intent that each shall hold interest as a separate, individual interest. On the death of a tenant in common his share goes to his heirs or devisees. An estate by **entirety** is an estate held by husband and wife at common law. By common law husband and wife are considered one person, so in such a case

they cannot properly be counted tenants in common or joint tenants. Upon the death of either the entire property vests in the survivor.

Note may be taken here of the property rights of married women. An unmarried woman, whether spinster or widow, is as free to contract as a man. Married women, however, under the old common law rules, were very narrowly restricted in their powers. Recent statutes have greatly enlarged their powers. In the English-speaking provinces, a married woman may now hold her separate property in her own name, may contract in respect to it, sue and be sued. Her separate estate, both real and personal, is free from the control, debts and obligations of her husband. In Quebec a different system exists. There the old Roman law practice of community of goods is found. Community of property between husband and wife exists unless there has been a contract or an order of the court to the contrary. In community the husband has the administration of the whole property, but at his death the widow takes half; he can will only his own half. The property of the wife is liable for the debts of the husband, and vice versa. When in community, the wife cannot hold movable property in her own name, unless it has been bequeathed her by third parties as her private property immovable property belonging to her before marriage or bequeathed her by parents or ancestors does not become part of the community. If husband and wife contract before marriage, or a court decrees, that they shall be separate as to property, the wife may carry on her business in her own name as freely as if unmarried, except that she cannot sell her real estate or bank stock without her husband's consent or a court order. If she becomes a trader she must register her intention of carrying on such business.

It is interesting to note that in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington, whatever is acquired by the labor or efforts of either a husband or wife after the marriage belongs one-half to each. This does not include property held at time of marriage or received by bequest. This rule reminds us of the fact that in the territory out of which these states grew, French and Spanish law, which were based on Roman law, once reigned.

The third basis of classification of estates is with regard to the time of their enjoyment, the period when possession begins. Estates are classified as follows:

Estates
- In possession
- In expectancy
  - Remainders
  - Reversions

The ordinary estate is the estate in present possession. When an estate for life or for years is created, there is an estate in residue to commence in possession when the life estate or estate for years ends. Such an estate is either a remainder or a reversion.

An estate in remainder, or, briefly, a remainder, is an estate granted to take effect and be enjoyed at the termination of another estate created by the same instrument. The other estate must be less than a fee simple, since the tenant in fee owns all of the estate that there can be in the property. A remainder is vested if the person who is to have it is in being and ascertained, and contingent, when the person to whom, or the event upon which, the remainder is to take effect is uncertain. Thus A who holds land in fee grants by deed a life estate to X, and a remainder in fee to Z. Z has a vested remander, which he may sell or bequeath. Or A grants X a life estate, Y a remainder for life after X's death, and Z a remainder in fee to be enjoyed after the death of both X and Y. A grants a life estate to X with the remainder in fee to the eldest son of Y; Y has no son; the remainder is contingent, and becomes vested when a son is born to Y.

A reversion is the residue left in the grantor or his heirs after the granting of a lesser estate. It is created by operation of law. Thus A, the owner of land in fee simple, conveys it to M for the life of N. A has a reversion, since by law when N dies, M's estate ends and reverts to A. Or A, again, leases the land to M for ten years; A has a reversion in the land to commmence in possession when M's leasehold expires. Afterwards A grants P a life estate in the land. A has now a reversion to commence in possession when both M's and P's estates are terminated. If P dies before M's tenancy expires, his life estate is of course of no value. Either A, M or P may sell his estate.

Questions for Review.

1. What are the different senses of the term "property"? Distinguish between real and personal property. What distinction is made in the Province of Quebecc Define corporeal, incorporeal property. Give instances of ecah.

2. What is meant by "land"? Does an owner of land control the air above it? Could he prevent an aeroplane flying across? What are the rights of neighbors as to border trees?

3. Who owns the land under navigable waters, in Canada? Who would have the right to develop power from a rapid in the St. Lawrence? What privileges have riparian owners in the case of navigable waters? In the case of non-navigable waters?

4. What is the distinction between natural and industrial fruits? Give instances of both. What legal result follows from the distinction? What is the distinction made in Quebec? Define a fixture. What was the common law rule as to fixtures. What was the reason underlying this rule? What rules are now followed?

5. Define easement. How may it be acquired? How may it be extinguished? What is a right of way? of air? of water? of support? What was meant by the term "ancient lights"?

6. What is an estate in land? On what different bases are estates classified? What was the source of our real property law? What is a freehold estate? an estate in fee simple? an entailed estate?

7. What is dower? In which provinces does the right of dower exist? How may a wife bar her dower? To what property does the right of dower attach? What happens if a man sells Ontario real property without having his wife sign the deed? What is curtesy? Explain a homestead estate. What exemption is granted in your province?

8. Define an estate for years, at will, from year to year, by sufferance. What is the difference between joint tenancy

and an estate in common? What is meant by community of goods? Where does this system exist, and why? How may a wife become separate as to property?

9. What is a remainder? What is a vested remainder? a contingent remainder? May such an estate be sold? What is a reversion? How is it created? What other estates may exist in the same property?

Questions for Written Answer.

1. Define personal and real property. What practical differences exist between the two classes?

2. Distinguish clearly between an estate in common and a joint tenancy, between a reversion and a remainder, between an estate for years and an estate from year to year.

3. Thompson, a married man, buys a farm for $6,000, pays $2,000 cash and gives a purchase money mortgage for $4,000. His wife does not join in the mortgage. Upon his death what will be her dower interest in this property?

4. Kendall owned some land on which Fisher held a mortgage. He built a saw-mill on this land and in it placed an engine built in masonry and put in other machinery fastened to the floor, intending it all the time to be permanent. Fisher foreclosed the mortgage. Who was entitled to the engine and machinery?

5. Dexter sells a house, which he is renovating at the time, to Merritt. The shutters have been taken to the painter's shop, and are there when the house is sold. Are they a part of the realty or of the personalty, and to whom do they fall? What of the chandeliers and gas fixtures which are screwed into the gas pipes? What of the gas pipes themselves?

LESSON X

Geldart's Elements of English Law.

The whole of this brief text should be read carefully, as it summarizes very clearly and concisely the essential features of the system of law which underlies the commercial relations of most English-speaking lands. Chapter III is of minor importance, dealing with local English institutions, and Chapters VII and VIII are not precisely concerned with Commercial Law, yet are of much practical every-day importance to business men. Some of the points covered are not taken up in the Lessons, but on the whole the book affords a good method of reviewing the topics already discussed.

Questions for Review.

1. What is the difference between 'a law' and 'the law'? Explain statute law, common law. Which overrides the other? Where do we find statute law? Where common law? Are judges bound strictly by precedents? What is an *obiter dictum*? Do judges make law? What is the system of case law? What are its advantages? its disadvantages? What weight is attached by courts in England to decisions of Irish, Ontario, Massachusetts courts on common law points?

2. Explain equity. What are the chief differences between common law and equity? How did equity jurisprudence develop? How, in England, are common law and equity now fused? What is the main difference between common law and equity rules on the subject of property? as regards contracts? as to remedies afforded? What are probate, divorce, and admiralty law?

3. May unborn persons have legal rights? Define infant. Are all infants in the same legal position? Are infants exempted from liability for tort? What is their lack of competence as to contracts? What, broadly, are the powers of parents and guardians? What children are legitimate? What disabilities are illegitimate children under? At common law, what was the status of married women? What changes have been made of late years? What was necessary for the celebration of a marriage, under English common law? under Scottish

law to-day? On what grounds may a marriage be declared void in England? in Quebec? in Ontario? What is the value of a plea of insanity against a criminal charge? in the case of civil obligations? Is drunkenness a defence in a criminal case? in contracts? What immunity does the King enjoy? What privileges have citizens which are not possessed by resident aliens? How is naturalization effected?

4. Define a corporation. Wherein does it differ from an unincorporated group? What is a corporation sole? What are the marks of a corporation? How is corporate character acquired? Is a corporation a person? Can a corporation be indicted for a criminal offence? How must it make its contracts? What limits the transactions into which it may enter? What is the rule of mortmain? Is it necessary to secure the permission of the state to organize a religious or social or charitable society? Have such societies a corporate personality? Who are liable for the debts of such a society? Who own its property? What special exemptions have trade unions in England?

5. May a principal be held responsible for crimes committed by his agent? What distinction is made between a servant and an independent contractor? Can an agent escape liability for tort or crime by pleading the instructions of his principal? In what circumstances can an agent bind his principal? What is ratification? How may an agent be appointed? how dismissed? What is the rule as to receiving commissions from both parties to a transaction? Is a partnership a legal personality? What are the liabilities of the partner, usually? What are 'limited partnerships'?

5. What do you understand by the term property? What is the distinction between ownership and possession? Give instances of possession without ownership, and of ownership without possession. Is possession evidence of ownership? Has a possessor as distinct from an owner any legal rights which will be protected? May possession pass into ownership? What is the English theory of land-tenure? Trace the development of the system since feudal times. What is an "estate in land"? Define fee-simple, estate tail, estate for life, reversion, remain-

der. How is land entailed? What is the object? How may an entail be broken? What were the evils of the settlement system? Define freehold, copyhold, leasehold. Who are the parties to a lease? What, broadly, are the rights of lessor and of lessee? What are tenancies at will? Explain co-ownership. Define easement, and give instances. Is an easement an estate in land? What is a rent-charge? How may land be conveyed? What are the provisions in England as to registration?

7. What is personal property? Can estates in personal property be created? How may personal property be transferred? Can anyone but the owner make a valid transfer? What are patents, copyrights, trade marks? What is meant by a trust in English law? How is it created? How did the term come to be applied to combinations of businesses in the United States? What are the duties of a trustee? What are the rights of a beneficiary under a trust? What is a mortgage? What is the process of foreclosure? How is priority of mortgages determined? Distinguish between pledge and lien. In what ways do liens arise? What is execution? What is the procedure in bankruptcy? When is a discharge given? What are the requisites of a valid will? May a beneficiary witness it? How is a will revoked? How is real estate divided in case of intestacy? personal property? What are the duties and powers of executors?

8. What is a contract? Distinguish from a conveyance. Define formal contracts, contracts of record, delivery. May a promise to abstain from unlawful conduct impart consideration? How is offer made? acceptance? What communication of both is necessary? What are the terms of the Statute of Frauds? Define mistake in the legal sense. Is it a frequent reason for voiding a contract? Give illustrations. Distinguish mistake, representation, and fraud. What are contracts *uberrimae fidei*? Explain the effect of duress and undue influence. What contracts are void for illegality? Are they always concerned with transactions which the law will punish? Who have rights and burdens under a contract? What are the special features of negotiable instalments as contracts? May a holder in due course have greater rights than the original

holder of the instrument? What is breach of contract? What right does breach confer on the other party? What are the rules as to amount of damages? Explain injunction, specific performance. How are contracts terminated?

9. What is a tort? What is the rule as to intention? as to motive and malice? What degree of negligence gives ground for action? May a person incur liability without intention or negligence? What are nominal damages, special damage? How is liability in respect of a tort terminated? What are the chief forms of wrongs to personal safety and liberty? In what cases may interference be justified? Define libel, slander. What constitutes publication of a libel or slander? What is the chief legal difference between them? Is justification a defence? What is the defence of privilege? How far does the right of free criticism on matters of public interest constitute a defence? When may a man recover damages for malicious prosecution? Is interference with a servant an actionable wrong? What is the common law ground for damages in case of seduction? Is interference with trade actionable, if the acts of interference are not in themselves unlawful? Illustrate. Distinguish between fraud as a tort and fraud as vitiating a contract. What are the chief torts as to property?

10. What are the sources of criminal law? What is the essential difference between civil and criminal law? Does every crime give someone a right to bring a civil action? Are all civil wrongs crimes? May the same act be both a crime and a civil wrong? Can both civil and criminal proceedings be taken for the same offence? What classification is made of crimes and offences? What are penal actions? Does the criminal code correspond to the moral code of the community? Are omissions to perform a legal duty punished? Is ignorance an excuse? Define "maliciously." What are principals and accessories before and after the fact? What is a conspiracy? What is high treason? the punishment? What constitutes a riot? What is a seditious libel? a blasphemous libel? a defamatory libel? Distinguish between murder and homicide. What is the core of the law relating to offences against pro-

perty? What are the punishments for the chief forms of such offence?

Questions for Written Answers.

1. Distinguish between common law, equity and statute law.

2. What are the important facts as to the legal status of infants?

3. Explain the different forms of estates and interests in land.

4. What contracts are void for illegality?

5. What are the chief forms of torts?

6. Distinguish clearly between civil and criminal law.

7. Have you any difficulties?

LESSON XI.

The Dominion Bankruptcy Act

The important subject of bankruptcy and insolvency (see Lesson II, page 40), has been given new importance by the enactment of a federal Bankruptcy Act, which went into force in 1920. The Act has been interpreted by several commentators, but probably for the business man no explanations so thorough and so clear have appeared as those contained in the address, by G. T. Clarkson, F.C.A., explaining the position of affairs before the Act and the changes which it has brought about. This address follows.[1]

Under the British North America Act the Federal Government has exclusive control over matters affecting bankruptcy and insolvency, and in the exercise of such powers an Insolvency Act was passed by it in 1869. This Act continued in force for about six years, but fell into disfavor particularly for the reason that the costs of administration under it were felt to be unduly high, and because debtors were able to obtain discharges with undue ease. As a result, the Act was repealed in 1875, when a new Act was passed. After being twice amended, this latter Act was repealed in 1880, since which date there has been no Dominion legislation controlling matters affecting insolvency excepting the Dominion Winding-up Act, which deals exclusively with the liquidation of limited liability corporations.

With the repeal of the Federal Insolvency Act in 1880, the provinces were left under the necessity of passing legislation which would provide for the distribution in an equitable manner of the assets of insolvent persons and partnerships amongst their creditors. Accordingly, Assignments and Preferences Acts were passed by one province after another, the Acts being so called for the reason that they are founded and based upon

[1]The Bankruptcy Act, by G. F. Clarkson, F.C.A. Address delivered at Annual Convention, Dominion Association of Chartered Accountants, Toronto, September, 1920, (C. C. A., January, 1921).

the voluntary assignment or transfer by a debtor of his assets to a trustee, who, with the realization of such assets, is required to divide them among creditors in the manner provided by the Assignment Act, and subject to any other laws governing property rights in the province where the assets of the debtor are situate. The Ontario Assignments and Preferences Act, as one of the first of such Acts to be passed by a province, was attacked as *ultra vires* on the ground that it related to bankruptcy and insolvency, which was a matter within the sole control of the Federal Parliament. The attack was unsuccessful, the Act being held by the Privy Council to be *intra vires* so long as there was no Dominion legislation in force with which it was in conflict. With no Dominion legislation—in so far as it affected the insolvency or bankruptcy of persons or partnerships—in force between 1880 and 1919, the Provincial Assignments and Preferences Acts have, under such judgment of the Privy Council, therefore, remained *intra vires,* and of full force and effect, but, with the passage of the new Federal Bankruptcy Act in 1919, they will now be *ultra vires* to any extent to which they may conflict with it. This means, in practical effect, that they are now superseded by the Bankruptcy Act.

In their operation the Assignments and Preference Acts have in most of the provinces provided a simple and economical method for the realization and division of the assets of debtors amongst their creditors. In certain instances, however, provincial laws governing property and civil rights have allowed claims of such character and to such extent to be made against the estates of insolvents as have penalized trade creditors severely, while at the same time costs of administration in certain provinces—but in certain of them only—have become excessive. The Acts are deficient in that, except in Quebec, they provide no means whereunder an unwilling debtor can be compelled to turn over his assets to his creditors. With the laws affecting property and civil rights different in the nine provinces, it has been difficult for creditors to keep in touch with all of them, in so far as they affect the ranking of

claims and the division of assets of estates among creditors. None of the Acts provide, nor can they provide, for the discharge of a debtor who has been unfortunate; neither are there provisions preventing a debtor who has committed fraud from obtaining a discharge, but with the question of discharge resting wholly a matter of bargain between a debtor and his creditors, a fraudulent debtor has usually been able to compound with his creditors and continue in business. These conditions have permitted avaricious creditors, seeking preferment, to penalize, if not prevent, an unfortunate debtor from obtaining a discharge, except upon terms or special treatment accorded to them; at the same time, they have allowed debtors, who have committed fraud, to bargain with their creditors individually, and frequently to obtain discharges at rates which have left them with profit, thus providing an incentive to them to again commit fraud as a method of making money at the expense of creditors.

While the Dominion Government, since the repeal of the Insolvency Act of 1880, and prior to the passage of the Bankruptcy Act of 1919, has refrained from enacting legislation in respect of insolvency, in so far as it affects individuals and partnerships, it has exercised control to some extent with respect to the insolvency of limited liability corporations, and through the medium of the Dominion Winding-up Act. Under this Act a corporation may be wound up after proof of certain conditions making it insolvent, when its assets are transferred to a liquidator, who is empowered, under the supervision of the Court, to realize upon such assets and divide the proceeds amongst creditors. It has been accepted that the Dominion Winding-up Act does not prevent a corporation from making an assignment under a Provincial Act for the benefit of its creditors, but once a Winding-up Order is granted and put in force, it supersedes an assignment. Frequently a Winding-up Order is granted and stayed in order to allow a corporation to be wound up under an assignment previously made as the more economical method of liquidation, but in recent years the question has been raised more than once as to whether there is not

danger in this course, and the possibility that all proceedings under an assignment may be made invalid and capable of being set aside if a Winding-up Order shall at a later time be granted upon a petition filed concurrently with the execution of the assignment and thereafter be proceeded with, has been suggested.

Under the Winding-up Act an unwilling debtor corporation can be compelled to hand its assets over to a liquidator for the benefit of its creditors, whereas, under the Assignments and Preferences Acts, an unwilling debtor cannot be compelled to do so except in the Province of Quebec. One or two classes of claims, which are definitely preferred under the Assignments Act—sometimes to the disadvantage of trade creditors—are, in addition, preferred under the Winding-up Act only if certain conditions can be or have been complied with. The Winding-up Act is of the same force and effect throughout the whole of the Dominion, whereas the Assignments Acts vary in effect according to the laws of each province. Under these conditions one would naturally assume that, curing certain disabilities met with in the use of the Assignments Acts, the Dominion Winding-up Act would be favorably looked upon by creditors and employed whenever the necessity of liquidating a company should arise. This is distinctly not the case, however, but, on the contrary, creditors invariably prefer to have an insolvent corporation wound up under the Assignments Act of the province in which its assets are located, largely because of the excessive cost of liquidating such a company under the Winding-up Act. This burden of cost is not entirely due to the terms and provisions of the Act itself, but largely to the rules, regulations and formalities by which administration of it has become surrounded, making it absolutely impossible for any liquidator or his counsel, with the constant applications necessary to be made in Court, to complete the winding up of an estate with anything like the economy in time and money possible under an Assignment Act. As an economical medium for the liquidation of limited corporations, the Winding-up Act is, therefore, not a complete

success; there are also no provisions in it facilitating the obtaining of an extension or discharge by a corporation against the wishes of minority creditors.

As a further medium for the winding up of the affairs of limited liability corporations, a number of provinces have passed Acts which permit the voluntary winding up of companies incorporated under charters from such provinces. These Acts do not relate to the winding up of companies which are insolvent, but lay down the procedure to be adopted for the realization and division of the assets of companies, able to pay their liabilities in full, which desire to retire from business and surrender their charters. I am not very familiar with such Acts of other provinces, but that for the Province of Ontario is cumbersome, and use of it is usually avoided where other means to obtain the end sought are available. These Acts, in any event, do not relate to insolvency or bankruptcy.

From the preceding it will be seen that, while the Assignments Acts have, with few exceptions, provided economical and satisfactory means for the realization and division of a debtor's assets amongst his creditors, they have been deficient, from the standpoint of creditors, to the extent that they have varied to a greater or less degree in their effects in the different provinces; they have presented no means, outside of Quebec, whereunder an unwilling debtor could be compelled to turn his assets over to his creditors, and in none of the provinces did they, or could they, provide machinery whereunder an honest debtor could obtain a discharge against the objections of any of his creditors, or a dishonest debtor be prevented from procuring a discharge as the result of bargaining with his creditors. The Dominion Winding-up Act, on the other hand, while it lays down the same basis for the liquidation of insolvent corporations in all provinces, has proven to be too expensive in administration, while, also, it has no provisions facilitating or permitting the granting of extensions or discharges to a debtor corporation without the consent of all creditors. With these conditions obtaining, representations were made to the Federal Government that it would be of

advantage to Canada as a whole if an Act were passed which would, amongst other things:—

(a) Provide a uniform basis for all provinces with respect to the bankruptcy and liquidation of estates of persons, firms and corporations, and the methods to be employed in the realization and division of the assets of such persons and corporations;

(b) Compel unwilling debtors to hand over their assets to the creditors;

(c) Provide means whereunder compromises might be effected and extensions obtained by debtors with the approval of a majority of their creditors and against the objections of a minority;

(d) Provide means whereunder discharges might be obtained by unfortunate but honest debtors, and at the same time prevent dishonest debtors from obtaining discharges, permitting them to remain in business. These representations having met with the approval of the Government, the Bankruptcy Act was passed in 1919, and with certain amendments made to it in 1920, it came into force on July 1st, 1920, with the proclamation of the Governor-General-in-Council.

The Bankruptcy Act covers all matters affecting the insolvency of individuals, partnerships and corporations in all parts of Canada, building societies, banks, savings banks, insurance companies, trust companies, loan companies and railway companies being excepted, and left subject to be wound up under the provisions of the Dominion Winding-up Act. In the drafting of the Act the benefits obtained under the Assignment Acts were recognized. Debtors are allowed to make voluntary assignments, and the control of estates is left entirely in the hands of creditors and inspectors appointed by them, with the right of reference to the Courts at times and under such circumstances as have been deemed necessary. In this way economy and expedition in the liquidation of estates will be assured if formalities and unnecessary procedures are not allowed to creep in and surround the administration of the Act. It is of the utmost importance, however, that creditors and

Trustees should recognize this fact, and resolutely set their faces against allowing the administration of the Act to become surrounded by undue formalities, because otherwise, and if such formalities are permitted, the benefits from the Act are not unlikely to be largely offset and the advantages expected nullified by excessive costs of liquidation.

In order to permit of the division of his assets amongst his creditors a debtor is allowed by the Act to make a voluntary assignment to a trustee, as under the Assignment Acts, but machinery is also provided whereunder a Receiving Order may be made against any debtor who is unwilling to turn his assets over to his creditors, or who has committed an act of bankruptcy. Such an assignment may be made only to an authorized trustee—one appointed by the Federal Government —who has furnished security for the proper carrying out of his duties, and if an assignment be made to other than an authorized trustee, it is void. Similarly, an authorized trustee only can be appointed a Receiver in Bankruptcy. Although there can be little doubt but that it is intended that trust companies should be entitled to be appointed authorized trustees and accept assignments and receiverships, some question exists as to whether, under the terms of Section 14 of the Act, and in particular the definition in the Act of the word "person," they fall within the classes of those entitled to be appointed. It would seem that the Act should be amended in this particular to make their right to be appointed clear.

With new legislation, such as the Bankruptcy Act, it is to be expected that conditions will arise which are not fully provided for by it, and this particularly in respect of the liquidation of limited liability corporations. In order to meet such a possibility, and to assure that the liquidation of such companies shall not be held up indeterminately pending decision on any points in controversy, the Act provides that the Court may, if, in its opinion, it seems advisable so to do, allow the winding up of limited corporations to be effected under the Dominion Winding-up Act instead of under the provisions of the Bankruptcy Act. The section permitting this to be done

was included, not with the intention that limited liability corporations should continue to be wound up under the Winding-up Act, but merely in order to provide relief and permit protection of creditors' interests.

Within five days after the making of an assignment or receiving order, a trustee accepting an assignment under the Act is required by the Act to call a meeting of creditors, to be held at a time not later than fifteen days after the mailing of notice of meeting. Thus the maximum time allowed between the making of an assignment or receiving order and the meeting of creditors is twenty days. In calling such meeting notices must be sent to the creditors, with a draft form of proxy on which the name of the trustee must not be inscribed. A special form of notice has also to be sent to the debtor, requiring his attendance at the meeting. In the meantime, the assignment or receiving order has to be registered with the Registrar of the Bankruptcy Court and notice of it given to Ottawa, while a copy of the notice of the assignment or receiving order and of the meeting of creditors must be published in the Canada "Gazette." There appears to be no provision in the Act requiring that notices of a meeting of creditors shall be given to the shareholders of a limited liability corporation which shall assign. This is an omission which will require to be rectified, for very frequently shareholders have a most substantial equity in the assets of an insolvent company and a right to be heard in connection with the disposition of such equity.

Immediately upon the making of an assignment or receiving order, the trustee is required to insure the assets of a debtor for their full insurable value, and he may not insure such assets for a lesser amount without the consent and approval of the inspectors of the estate in writing. The trustee may also carry on the business of a debtor with the approval in writing of the inspectors, and then only to such extent as they shall authorize. Inasmuch as a period of time will always intervene between the date of any assignment and the appointment of inspectors by the creditors, these provisions may upon

occasion become very embarrassing to trustees, particularly with respect to the question of insurance. As an example, I would state that we have an estate in our hands at the present time where assets of a hazardous nature are appraised at a very large amount, as against which, I am convinced, that upon forced sale they will not realize more than 25 per cent. of such sum. To insure these assets for the full insurable value would mean to pay a premium equal to a considerable percentage of their realizable value. In the event that we shall so insure them, it is a certainty that we will be throwing away a large percentage of the dividend which will ultimately go to creditors; on the other hand, if we do not insure them to their full amount, then we may be personally liable for heavy damages in the event of their being destroyed. In the meantime, the affairs of the corporation are so confused that we cannot call a meeting of creditors for at least three weeks so that inspectors may be appointed. This condition of affairs leaves a trustee in an unfair position, and, in my opinion, the Act should be amended to permit him to obtain relief from such a liability with the approval of Court. So far as the carrying on the business of an insolvent is concerned, the trustee, pending the appointment of inspectors, will require to exercise his best judgment and take the advice of the larger creditors, whereafter he can fairly assume that the inspectors will ratify what has been done.[1]

In respect of the meetings of creditors, the Act provides that those creditors only who shall have filed their claims with the trustee shall be allowed to vote, and the bases upon which creditors shall vote are prescribed. With the holding of the first meeting of creditors, at which the debtor is required to be present and explain his affairs, it is contemplated that inspectors shall be appointed, and under the Bankruptcy Act the control of the inspectors over the conduct of the affairs of an estate appears to be very much greater than under the Assign-

[1]An amendment has since been passed, requiring the trustee to insure the property merely to the fair realizable value thereof, or such other amount as may be approved by the inspectors.

ment Acts hitherto in use. Under the Assignment Acts the conduct of affairs was left largely in the hands of creditors, with certain powers voted to or vested in the inspectors. Under the Bankruptcy Act the inspectors are given very ample powers, with little or no mention made as to expression by creditors of their wishes, and the trustee is required to take his instructions from the inspectors. In the taking of his instructions from the inspectors the trustee is required in many instances to receive them in writing. This, perhaps, has its advantages, but it is opposed to current practice, and perhaps in the future it may be found possible to dispense with it.

In respect of securities held by creditors, the Ontario Assignment Act provided that a trustee could redeem them only with the payment of a bonus of 10 per cent. over and above the amount at which they had been valued by the creditor. Under the Bankruptcy Act, any security held by a creditor may be redeemed at its valuation, or the trustee may require the creditor to offer the whole or any part of it for sale by public auction. A secured creditor may require the trustee to elect whether the property held as security will be redeemed by him or put up for sale by public auction, and if the trustee does not elect to redeem or have the property realized within one month after receiving notice from the creditor, the security becomes the property of the creditor at the price at which it was valued by him. A secured creditor may at any time, within two months of the filing of his claim, amend the valuation attached by him to any security, but only provided the trustee has not, in the meantime, elected to acquire it at the original valuation.

In respect of the ranking of creditors against an estate, these changes are provided by the Bankruptcy Act: A husband or wife of a bankrupt is not allowed to rank against her/his estate, or claim for any wages, salary or compensation for work done until all claims of other creditors have been satisfied. Further, no relative of a debtor or member of a firm may claim for wages or salary exceeding three months' wages until all claims of other creditors have been paid. When a limited

liability corporation is being wound up, no officer, director or shareholder is entitled to claim for wages for an amount exceeding that for three months. The preferred claim of a landlord is limited to three months' rent, if accrued to the date of the assignment, provided there are assets on the leased premises equal in value thereto. A landlord may, however, prove as an ordinary creditor for any further rent due to the date of the assignment and for any accelerated rent (not to exceed that for three months) accruing under the terms of his lease, but he may not rank as a creditor for the balance of rent for the unexpired term of the lease. In case, also, a landlord shall rank for accelerated rent and the trustees continue to use the leased premises, the amount paid to the landlord in respect of the accelerated rent shall be credited against any rent payable for the period of occupation by the trustee. The trustee may elect to retain the premises occupied by the debtor for the balance of the term of the lease, or he may disclaim the lease and agreement. If he retains the premises for more than three months, the landlord is entitled to three months' notice or three months' rent. If he shall elect to retain the premises, he may assign the lease, even though the contract provides against sub-letting the premises.

In order that the Act may not conflict or interfere with the control of the provinces over property and civil rights, Section 51 stipulates that nothing in the Act shall interfere with the collection of taxes, rents or assessments payable by or levied or imposed upon the debtor or upon any property of the debtor under any law of the Dominion or of the province wherein such property is situate, or prejudice or affect any lien or charge in respect of such property created by any such laws. This means that taxes and other such rates and assessments are preferred against the assets of an estate and any liens or encumbrances imposed by or existing under a provincial law are of full force and effect against the assets of a debtor. Income and Excess Profits taxes are also made preferred by this section and the terms of the Act relating thereto.

Under Section 29 of the Act it is provided that if a debtor

makes a voluntary settlement of any of his property and thereafter makes an assignment or becomes bankrupt within one year after the date of the settlement, such settlement shall be void, no matter whether the debtor was solvent or insolvent at the time of making it. Further, that if at any time within five years of the making of a settlement, a debtor shall become bankrupt or make an assignment, the settlement shall be void unless he shall be able to prove that at the time of making it he was able to pay his liability without the use of the property transferred. Again, if a debtor enters into a marriage contract by which he agrees to pay money or settle property which he did not own at the time upon his wife, it is provided that no claim can be made against the estate of the debtor in respect of such contract until after all other creditors have been paid.

Section 30 of the Act provides that where a person engaged in any trade or business makes a general assignment to any other person of existing or future book debts, or any part or class thereof, and is subsequently adjudged a bankrupt or makes an assignment, the transfer shall be void in respect of any accounts remaining uncollected at the time of the assignment unless it shall have been registered in compliance with the provisions of a statute in force in the province where the debtor resides. It is provided, however, that nothing in the section shall render void any assignment of book debts due at the date of the assignment from specified debtors or of debts due under specified contracts. The effect of this section seems to be that general assignments of book debts are void as against creditors (excluding possibly certain classes of them) except in those provinces where there is legislation requiring the registration of such assignments, when, if registered, so as to give public notice of them, they are valid if they do not constitute an illegal preference. In Ontario we have no legislation requiring the registration of assignments of book debts, and accordingly the question has been raised as to whether in this province assignments in general form of present or future book debts will be void or not as against a trustee. It is rather

futile to attempt to interpret the legal meaning of the section, but as I read it such a transfer made by a debtor in Ontario (who shall subsequently become a bankrupt) to a wholesale house or manufacturer will probably be void.[1] On the other hand, doubt exists as to whether such an assignment as between a bank and a customer, who may become insolvent, will be valid or invalid, having regard to the fact that the word "person," as interpreted by the Act, appears to exclude building societies, banks, savings banks, insurance companies, loan companies and railway companies.[2] The consensus of opinion is that such an assignment will be of very questionable value. In my opinion, it is much to be regretted if this shall be the case, for in many classes of trade present and future receivables form about the only tangible security which manufacturers, distributors and traders are able to give to their bankers as the basis for obtaining credits needed. Doubt, therefore, as to the validity of such a security will undoubtedly serve to bring about a restriction of credit to certain classes of trade in Ontario which, particularly at this time, cannot be helpful.

With respect to unjust preferences, the law in Ontario hitherto has been that if a debtor makes a conveyance to a creditor which has the effect of giving the creditor an unjust preference, and such conveyance is attacked or the debtor makes an assignment within sixty days after the date of it, then it is presumed *prima facie* to have been made with the intention of preferring the creditor, irrespective of whether it was made voluntarily or under pressure, and it can be set aside. Further, if no attack be made or the debtor does not assign within sixty days of the date of the conveyance, it has still remained possible to set aside the preference, but only

[1]It has been held by the Court in an Ontario case that such assignments are not void, since the Act could not have been meant to require compliance with a course which is impossible, because of the absence of any legislation as to registration.

[2]The Act has been amended by omitting the words "to any other person, thus removing the doubt as to the validity of assignment of book debts to banks.

with proof that the creditor receiving the preference knew at the time that the debtor was insolvent—the onus of proof of this fact was left upon those making the attack, however.

Under the Bankruptcy Act any conveyance made within three months of the making of an assignment or receiving order is void and can be set aside, and the mere making of such a conveyance so as to give an unjust preference to a creditor constitutes an act of bankruptcy. On the other hand, there is nothing in the Act dealing with preferences which may have been given prior to within three months of an assignment or receiving order, and it would, therefore, appear unlikely that such preferences can now be set aside.

In the liquidation of limited liability corporations the Act provides a radical departure in so far as the collection of unpaid stock held by shareholders is concerned. Under the Dominion Winding-up Act amounts unpaid upon capital stock can be collected only after proof has been given to the Court that the other assets of the company are not sufficient to pay creditors in full, and this has resulted in the collection of contributions being deferred until the realizable value of other assets has been fairly well established. Frequently this delay has permitted shareholders to make away with their assets so as to avoid payment of liability. Under the Bankruptcy Act every shareholder is made liable to contribute the amount unpaid on his shares immediately with the making of an assignment or receiving order, the trustee being empowered to demand such payment within thirty days. With demand served upon him the contributory has fifteen days within which to contest liability and if he shall fail to notify the trustees that he disputes liability he may not, except with the leave of the Court, set up any defence of which he has not notified the trustee. Should the contributory fail to pay at the end of the thirty days the trustee may, with the approval of the inspectors, apply to the Court and receive judgment and thereafter collection from the contributory. The effect of these provisions will be that immediately upon the failure of a corporation contributories will be called upon to pay their unpaid stock

and if the amount of the same shall be substantial, as is frequently the case, shareholders of corporations will come to realize that their best interests will be served by paying their contributions and thereafter liquidating the company themselves, in preference to withholding such payments and forcing it into bankruptcy. In the event that the liabilities of a limited liability corporation in bankruptcy shall be paid in full and certain shareholders make full payment of their capital stock, while others fail to do so, the rights of all shareholders may be adjusted as between themselves before the Court. Such an adjustment is, however, deemed to be a matter without the bankruptcy proceedings and one with which the trustee is not concerned. Hitherto it has been part of the duties of a liquidator to control the proceedings leading to such adjustments as all facts relating thereto are in his possession and his alone. Under these circumstances, it remains to be seen as to whether in the end it will not be more economical to provide that the trustee shall act rather than compel the shareholders to take action on their own behalf.[1]

In the liquidation of estates it is necessary and it has been customary for the trustees to prepare statements of assets and liabilities for submission to the creditors at their first meeting. The Bankruptcy Act requires that the debtor shall prepare a statement of his affairs and prove it and it is upon the basis of this statement that he must submit himself for examination at the first meeting of creditors. The statement so to be furnished by the debtor will undoubtedly be prepared in conjunction with the trustee who is now required to file a copy of it with the Registrar of the Bankruptcy Court.

With the realization of the assets of an estate a dividend must be paid within six months, and thereafter whenever a trustee has sufficient funds on hand out of which to pay creditors 10 per cent. on their claims. A statement of receipts and payments has to be sent to creditors and the final dividend sheet filed at Ottawa. All declared and unpaid dividends are

[1]An amendment of 1921 empowers the Court to direct the trustee to take such action.

also required to be paid to the Receiver-General of Canada within six months after payment of a final dividend.

Section 40 of the Act deals with the remuneration of a trustee and provides that he shall be paid such amount as shall be voted him by the creditors at any meeting and if no amount is fixed by the creditors it shall not exceed 5 per cent. of his receipts under any circumstances. Similarly section 67 provides that the amounts payable to attorneys, solicitors or counsel of trustees shall not exceed 5 per cent. of the gross receipts of an estate where the estate exceeds $5,000, or 10 per cent. where it is less than $5,000. In the vast majority of estates the remuneration thus provided is completely adequate and in large estates it is very seldom that any trustee and his counsel—in Ontario, at least—receive any such rates or remuneration. On the other hand there are many estates where the assets are of nominal or small amount, while there are others where fraud has been perpetuated and the assets remaining constitute but a small percentage of those which should be available for creditors. With estates of the latter character it is invariably necessary for a trustee to make extensive examinations of accounts and records as the basis for litigation to recover assets which have been improperly diverted or improperly paid out. If the litigation is successful the augmented estate is frequently substantial in which event the remuneration provided by the Act may be adequate. On the other hand if the litigation instituted should fail for any reason, or be only partially successful, then the amount which could be recovered by the trustee might become negligible and wholly insufficient to meet even his out-of-pocket costs let alone produce any remuneration. So far as the solicitor is concerned, he would under such conditions require to take the litigation on speculation, with knowledge that if it should prove unsuccessful his disbursements might exceed any allowance which he could recover. As trustees and their counsel are only human it is not to be expected that they will be willing to act in connection with estates of such a character and already the effect of the section has become apparent where

debtors desiring to assign have had to forego doing so because trustees could not be found who were willing to take charge of their estates. While the intention of the sections is meritorious, therefore, to the extent they they impose limits upon the remuneration which may be paid to trustees and their counsel they are not elastic enough but disregard the practical conditions which exist with respect to small estates or those where extensive litigation has to be undertaken. In my opinion the Sections will require to be amended so as to provide that greater remuneration may be allowed to trustees and their counsel where the conditions make it reasonable that they should receive the same, and I think the interests of the creditors will be fully protected if additional remuneration be allowed only with the approval of creditors or inspectors and the subsequent approval of the Court. Under present conditions, however, it is undoubted that the effect of the sections will have to be drawn to the attention of the government and amendments asked for.

The Act provides that when the Winding-up of an estate has been completed the trustee may obtain a discharge by Order-of-Court. Before obtaining this discharge he must file a complete statement of his receipts and payments, together with a report upon the affairs of the estate, after which notice of the application of the discharge must be given to the creditors and the debtor who may appear and contest the same if they desire to. If no objection be registered to it the trustee gets his discharge. In respect of such applications for discharges I sincerely hope that a resolution of inspectors or creditors will be accepted by the Court as adequate proof of the proper performance by a trustee of his duties and that the Court will not impose the cost and delay upon the estate of vouching and examining into all receipts and payments.

In addition to dealing with matters affecting bankruptcy the Act contains provisions whereunder a debtor may obtain a composition or an extension of time for the payment of his liabilities. Under these provisions a debtor may call a meeting of his creditors, through the medium of an authorized

trustee, and place a statement of his affairs before them, with the proposal which he desires to make for a composition or extension. When the meeting of creditors is held the debtor may be examined, and thereafter if two-thirds of his creditors[1] in amount approve of the proposal, or any amendment thereto, it shall be deemed to have been accepted, and when approved by the Court shall be binding upon all creditors. A creditor may object to the granting of a composition or extension, in which event he will be heard by the Court, which is empowered to withhold approval of the scheme of arrangement or compromise. A debtor having committed an act of bankruptcy in asking for the composition or extension, he may be adjudged a bankrupt if the scheme is not approved of. These provisions permit a debtor, who has been unfortunate but is honest, to compromise his liabilities to his creditors or to obtain an extension of time for the payment of his debts, with the approval of the majority of the creditors, and they protect the debtor from being penalized by importunate creditors who are unwilling to accord to any such arrangement except upon special terms granted to them.

Finally the Act deals with what are bankruptcy offences or offences which when committed prevent a bankrupt receiving a discharge except upon terms laid down by the Court. A debtor commits a bankruptcy offence when he does not disclose the whole of his property; if he fails to keep records sufficient to disclose his business transactions within three years preceding his bankruptcy; if he makes a material omission in his statement of affairs; if he allows a false debt to be proved against his estate; if he destroys or conceals any of his records; if he makes a false entry in his books or improperly alters any document; if he attempts to account for his property by claiming fictitious losses; if he has obtained credit by false representations; if he has made false statements in writing with the intent to mislead as to his financial position; if he has continued to trade after knowing himself to be insolvent.

[1]Amended to read "a majority of all the creditors and holding two-thirds in amount of all the proved debts."

An undischarged bankrupt commits an offence when he obtains credit in excess of $50.00 without notice that he is an undischarged bankrupt, or he uses a deceptive name in business. A trustee commits an offence when with intent to defraud he fails to observe and perform the provisions of the Act governing his duties.

From what I have said it will be seen that the Bankruptcy Act will be of benefit in that the bases for the winding-up of estates throughout Canada are largely standardized, while unfair preferences which have obtained in several of the provinces will also be done away with. The Act will also provide a means for forcing an unwilling debtor to turn over his property to his creditors, and debtors are compelled to account for their property and keep proper records of their transactions if they are not to remain undischarged bankrupts. An honest, but unfortunate, debtor can also obtain a composition or extension without being penalized by creditors seeking undue advantages, while dishonest or fraudulent debtors can be prevented from obtaining discharges or the right to do business by bargaining with their creditors.

I believe that economical administration of estates can be effected under the Act so long as the procedure remains simple and follows closely that adopted in connection with the Assignment Acts. In my opinion it is almost a foregone conclusion, however, that if formalities be allowed to creep into their administration or the control of estates be transferred to any material extents from the hands of creditors to the Courts, the same expenses and delays will be met with as are at present encountered in connection with the Dominion Winding-up Act. The Act appears to me, however, to form a good starting point for Federal Legislation in respect of bankruptcy but nobody can pretend that it is perfect, and several of the discrepancies which I have touched upon are those which have come to light since it has been put in force. If, however, the Federal Government will look upon such a course sympathetically it will be possible to rectify these—to simplify procedures laid down by the Act and from time to time to do away with

some of the requirements now in force which while of questionable advantage encumber administration without any apparent or compensating benefits being obtained from them.

Questions for Review.

1. What is the purpose of bankruptcy legislation?.
2. What was the original scope of bankruptcy laws? Insolvency laws? What is the meaning of the terms "bankrupt" and "insolvent" to-day?
3. What is an "act of bankruptcy"? State the acts of bankruptcy in the Dominion law.
4. What are the Courts of Bankruptcy in your province?
5. State the division of powers on insolvency matters between the federal and the provincial authorities. What use did the provinces make of their powers between 1880 and 1919? What is the present status of these provincial laws?
6. Under what circumstances is the voluntary assignment method of dealing with an insolvent likely to be followed, and under what circumstances the receiving order method?
7. Outline the procedure in calling and conducting a creditors meeting. What creditors may vote?
8. What claims against the estate of the bankrupt are preferred under the Act? What is meant by an "unjust preference"?
9. Discuss the status of general assignments of book debts under the Act.
10. What is the liability of a holder of shares not wholly paid up in a company which has come under the Act? Who adjusts the rights of contributories as among themselves?
11. What is the duty of the trustee as to payment of dividends?
12. What are the duties of debtors under the Act? What steps must be taken b ythe debtor to obtain his discharge? by the trustee?
13. What settlements of property prior to bankruptcy or assignment are void as against the trustee? What are binding?

14. What is the obligation of a banker with whom an undischarged bankrupt or assignor has an account?

15. What bankruptcy offences of the debtor are punishable? of the trustee? of the creditor?

16. What is an authorized trustee? a receiver in bankruptcy?

17. A debtor gives a chattel mortgage to a creditor on Jan. 5, 1922, purporting to secure the sum of $3,200 paid at or before its execution, this sum to be repaid with interest at 7 per cent. on Jan. 5, 1923. Investigation shows that the creditor has sold goods and advanced cash at different times during the preceding year, and that on Dec. 29, 1921, the net debt was $2,988; there were no further transactions before the mortgage was given. On March 3, 1922, the debtor assigns. Will the chattel mortgage transaction stand?

Questions for Written Answer.

Answer Nos. 5, 6, 8, 9, 14, and 17 above.